IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1478

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, and its LOCAL UNIONS 1013, 1131, 1489, 1700, 1733, 2122, 2210, 2405, 2421, 2927, 3662 and 4203,

Petitioners,

v.

JOHN S. FORD, WILLIE CAIN, WILLIE L. COLEMAN, JOE N. TAYLOR, ROBERT CAIN, DAVID BOWIE, EARL BELL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and UNITED STATES STEEL CORPORATION.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BERNARD KLEIMAN
CARL B. FRANKEL
United Steelworkers of America, AFL-CIO-CLC
Five Gateway Center
Pittsburgh, Pa. 15222

MICHAEL H. GOTTESMAN
ROBERT M. WEINBERG
Bredhoff, Cushman, Gottesman & Cohen
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

JEROME A. COOPER
JOHN FALKENBERRY
Cooper, Mitch & Crawford
409 North 21st Street
Birmingham, Ala. 35203

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATUTE INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	19
CONCLUSION	25

Appendix:

Opinion of the District Court	App. 1
Opinion of the Court of Appeals	App. 29
Order and Opinion on Petition for Rehearing	App. 53

CITATIONS

Cases:

Albemarle Paper Co. v. *Moody*, 422 U.S. 405 (1975) .. 2, 13, 17, 19-23

Bing v. *Roadway Express, Inc.*, 485 F.2d 441 (5th Cir. 1973) .. 11

Ferrell-Hicks Chevrolet, Inc., 160 NLRB 1692 (1966) 24

Fibreboard Paper Products Corp., 138 NLRB 550 (1962), enforced 322 F.2d 411 (D.C. Cir. 1963), affirmed 379 U.S. 203 (1964) 24

Kohler Co., 148 NLRB 1434 (1964), enforced 345 F.2d 748 (D.C. Cir. 1965) 24

Lemon v. *Kurtzman*, 411 U.S. 192 (1973) 19

Page

Local 138, Operating Engineers, 151 NLRB 972 (1965) 24

Local 189 v. *United States,* 416 F.2d 980 (5th Cir. 1969), cert. denied 397 U.S. 919 (1970) 8, 15

Lodge 743, International Association of Machinists v. *United Aircraft Corp.,* —F.2d—, 90 LRRM 2272 (2nd Cir. 1975) 24

Long v. *Georgia Kraft Co.,* 455 F.2d 331 (5th Cir. 1971) 11

Matter of Bethlehem Steel Corp., OFCC Dkt. 102-68 (1970) .. 9-11, 12, 15

NLRB v. *Baltimore Transit Co.,* 140 F.2d 51, 55 (4th Cir. 1944), cert denied 321 U.S. 795 (1955) 24

NLRB v. *E & B Brewing Co.,* 276 F.2d 594 (6th Cir. 1960), cert. denied 366 U.S. 908 (1961) 24

NLRB v. *Guy F. Atkinson Co.,* 195 F.2d 141, 149 (9th Cir. 1952) 24

NLRB v. *IBT, Local 41,* 225 F.2d 343 (8th Cir. 1955) 24

Quarles v. *Phillip Morris Co.,* 279 F. Supp. 505 (E.D. Va. 1968) 7, 8

Retail, Wholesale and Department Store Union v. *NLRB,* 466 F.2d 380 (D.C. Cir. 1972) 23

Rowe v. *General Motors Corp.,* 457 F.2d 348 (5th Cir. 1972) ... 11

United States v. *Allegheny-Ludlum Industries, Inc.,* 8 FEP Cases 198 (N.D. Ala. 1974), affirmed 517 F.2d 826 (5th Cir. 1975), pets. for cert. pending, Nos. 75-1005, 75-1008 16-17

United States v. *Bethlehem Steel Corp.,* 312 F. Supp. 977 (W.D.-N.Y. 1970), mod. 446 F.2d 652 (2nd Cir. 1971) ... 8-9, 11, 12, 15

United States v. *Georgia Power Co.,* 474 F.2d 906 (5th Cir. 1973) 11

United States v. *H. K. Porter Co.,* 296 F. Supp. 40 (N.D. Ala. 1968) 8, 11, 12, 15

United States v. *Hayes International Corp.,* 456 F.2d 112 (5th Cir. 1972) 11

United States v. *Jacksonville Terminal Co.,* 451 F.2d 418 (5th Cir. 1971) 11

Page

United States v. *Local 189*, 301 F. Supp. 906 (E.D. La. 1969), affirmed 416 F.2d 980 (5th Cir. 1969), cert. denied 397 U.S. 919 (1970) 7, 8

Whitfield v. *United Steelworkers of America*, 263 F.2d 546 (5th Cir. 1959), cert. denied 360 U.S. 902 (1959) 6-7, 8, 11, 14-15

Statutes and Executive Orders:

Civil Rights Act of 1964, Title VII, 42 U.S.C. §2000e et seq. 2-25

Section 706(g), 42 U.S.C. §2000e-5(g) 3, 19

Section 707, 42 U.S.C. §2000e-6 3

Executive Order 11246

National Labor Relations Act, 29 U.S.C. §151 et seq 19, 22-25

IN THE

Supreme Court of the United States

October Term, 1975

No.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, and its LOCAL UNIONS 1013, 1131, 1489, 1700, 1733, 2122, 2210, 2405, 2421, 2927, 3662 and 4203,

Petitioners,

v.

JOHN S. FORD, WILLIE CAIN, WILLIE L. COLEMAN, JOE N. TAYLOR, ROBERT CAIN, DAVID BOWIE, EARL BELL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and UNITED STATES STEEL CORPORATION.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The memorandum of opinion of the United States District Court for the Northern District of Alabama, issued December 11, 1973, is reported at 371 F.Supp. 1045, and is reprinted at App. 1-28 (pages 1-28 of the appendix to this

petition). The opinion of the United States Court of Appeals for the Fifth Circuit, issued October 8, 1975, is reported at 520 F.2d 1043, and is reprinted at App. 29-52. The order and opinion of that court on the petitions for rehearing, issued January 14, 1976, is reported at 525 F.2d 1214, and is reprinted at App. 53-54.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was issued on October 8, 1975. Timely petitions for rehearing were filed by several parties, and were denied (with clarification of the original opinion) on January 14, 1976. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether, applying the principles enunciated in *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975), a district court abused its discretion when it concluded, for the following reasons, that it would be inequitable to award backpay to most black employees at a steel plant for the consequences of a seniority system which perpetuated the effects of assignment discrimination occurring prior to the enactment of Title VII of the Civil Rights Act of 1964:

> (a) The Company and Union had been "in the forefront of expanding employment opportunities for blacks" and had "modified the employment practices . . . periodically to comply with all legal requirements as from time to time they with reason understood them to be;"
>
> (b) A consistent line of judicial and administrative decisions had declared that "the dangers and complexities of the steel manufacturing process" precluded modification of the seniority system, and the Company and Union had relied upon those decisions in maintaining the seniority system as it was; and

(c) The court could not in any event "make whole," monetarily, those discriminatorily affected by the seniority system, for it is impossible to determine who suffered monetarily from the system, let alone in what amounts.

STATUTE INVOLVED

Section 706(g) of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. §2000e-5(g), provides in pertinent part as follows:

> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate."

STATEMENT OF THE CASE

This petition results from consolidated actions brought under Title VII of the Civil Rights Act of 1964, attacking employment practices at the largest steel plant in the South, the Fairfield Works of United States Steel Corporation (hereinafter "the Company"). Plaintiffs were the United States (which brought a "pattern and practice" action under Section 707 of the Act, 42 U.S.C. §2000e-6) and several black employees suing on behalf of certain classes of black employees under Section 706(g) of the Act, 42 U.S.C. §2000e-5(g). Defendants were the Company, and the United Steelworkers of America and several of its locals (hereinafter collectively "the Union").

The complaints alleged that the Company had, until 1962, discriminatorily assigned newly-hired black employees only to certain jobs. As that discrimination predated the enactment of Title VII, plaintiffs could not and did not claim that it violated Title VII, nor that they should receive a remedy therefor. But plaintiffs contended that the "line of progression" seniority system contained in the collective bargaining agreement perpetuated, after enactment of Title VII, the effects of the pre-Act discrimination. As relief for this perpetuation of effects of pre-Act discrimination, plaintiffs sought the remedies which courts have traditionally ordered in similar cases arising in industries *other than steel*: a decree permitting those who had been discriminatorily assigned to use plant seniority, and to receive rate retention, upon transferring to other lines of progression. Plaintiffs also sought back pay for the defendents' failure to install these remedies immediately when the Act became effective.

Defendants contended that business necessity precluded the installation of plant seniority and rate retention in steel plants, and thus that their seniority system did not unlawfully perpetuate the effects of the Company's prior assignment discrimination. Defendants did not dispute the propriety of plant seniority and rate retention in *other* industries; their defense was predicated upon unique characteristics of the steel manufacturing process, described herein.

Following a six-month trial, the district court devised a means for providing plant seniority and rate retention which it believed consistent with business necessity.[1] These remedies were installed by the court's decree. However, the

---

[1] The system devised by the district court contained special features, tailored to the unique characteristics of the steel industry, designed to assure that discriminatees would receive "training and experience before rising to more responsible positions" and thus to avoid creating "a significant hazard to personnel and equipment." App. 15-16, nn. 25, 27, 29.

court denied backpay for the defendants' failure to install such remedies earlier. The court explained that defendants had relied upon earlier decisions holding that business necessity *precluded* the furnishing of these remedies in steel plants, and it concluded that an award of backpay would in any event be speculative (because it could not be established that any particular employee would have fared better had the remedies been installed earlier). For these reasons, the court held that in the particular circumstances of the case an award of backpay would be inequitable.

The employee-plaintiffs appealed the denial of backpay, and the court of appeals ruled that the district court had abused its discretion in denying backpay. Our petition seeks review of this back pay holding.

1. The History of Litigation Involving Seniority Systems in the Steel Industry Prior to the Trial of the Instant Case.

Steel plants differ vastly from plants in other industries whose practices have been adjudicated under Title VII. Steel plants are much larger: for example, the plant involved in this case employs 12,000 persons (App. 3). In a steel plant, there are an enormous number of different jobs, with widely varying skill requirements. Here, for example, there are more than a thousand different jobs in the production and maintenance unit alone (App. 4). The steel manufacturing process involves manifold operations performed on molten metals, creating enormous hazards for all employees if someone fails to perform his job properly. Employment in steel plants is highly cyclical. The seniority systems which have developed in steel plants, responsive to these unique conditions, consequently are far more complex—and must be far more complex to ensure that at all times each job will be manned by an employee with the requisite skills—than those in other industries. A graphic description of these attributes of steel plants is provided in Judge Pointer's opinion, at App. 2-10.

Because steel plants are different, it is perhaps not surprising that the law relating to seniority systems in the steel industry developed differently than it did with respect to such systems in other industries. The early decisions confirmed the defendants' belief that it would be unsafe to allow employees to utilize plant seniority and rate retention in a steel plant, i.e. that to permit employees to move on an accelerated basis to jobs for which they had received neither training nor experience would endanger the lives not only of those who took advantage of these opportunities, but also of those who worked in the vicinity and could suffer the consequences of improper handling of molten metal. As the court below recognized, the early decisions furnished "respectable support" for the defendants' belief that "the remedies of plant-service seniority and rate retention would not be applied to the steel industry due to the dangers and complexities of the steel manufacturing process," App. 48-49.

In 1956, a decade before passage of Title VII, this Union began a program to merge separate black and white seniority lines in southern steel plants. The program began with the Houston plant of Armco Steel Corporation, the second largest steel plant in the south. Consistent with their concerns about safety, the company and union did not authorize employees in the previously black lines to exercise seniority accumulated prior to merger for the purpose of moving on an accelerated basis to the more sophisticated jobs in the previously white lines; rather, they provided that such employees would begin to accumulate seniority for such advancement from the date of the mergers. Soon after the mergers had been accomplished, a few black employees filed suit alleging that the Union had breached its duty of fair representation by not allowing black employees to use their accumulated seniority in the merged lines. The Fifth Circuit rejected the claim. *Whitfield* v. *United Steelworkers of America,* 263 F.2d 546 (5th Cir. 1959), cert. denied 360 U.S. 902 (1959). Declaring that "angels could do no more,"

Judge Wisdom approved the seniority system as fair "recognizing the necessity for reasonable standards of operating efficiency." 263 F.2d at 551.

The seniority system in Fairfield, challenged in the instant case, was modeled after that approved in *Whitfield*. The mergers of formerly black and white seniority lines, accomplished prior to enactment of Title VII, were not lightly undertaken in the social climate then prevailing in Alabama, nor were they accomplished without pain for those who made them. As Judge Pointer found (App. 14, n. 23):

> "These changes pre-dated most of the dramatic changes in education, housing, public accommodations, etc. Responsible leaders for the company and unions were, according to the evidence, subjected to threatening and abusive communications, vilification generally in the community, and hanging in effigy. Ten years later, when the battle cry has changed such that it typically begins, 'we're not fighting integration but . . . ,' there is a tendency to block out the memory of what was said and done in the early 60s."

Title VII, for whose enactment the Union had lobbied strongly (App. 25), took effect in 1965. It became apparent from the earliest decisions that, in the smaller, less complicated plants found in other industries, Title VII would require that assignment discriminatees be awarded plant seniority and rate retention in order to eliminate the continuing effects of pre-Act discrimination. See, e.g. *Quarles* v. *Phillip Morris Co.*, 279 F.Supp. 505 (E.D. Va. 1968) (tobacco plant); *United States* v. *Local 189*, 301 F.Supp. 906 (E.D. La. 1969) (paper mill). However, the courts uniformly declared that the greater hazards and complexities of steel production made it a "business necessity" that plant seniority and rate retention—with their potential for rapid movement of untrained and inexperienced employees to highly skilled, dangerous jobs—*not* be implemented in steel plants.

The first Title VII decision involving a steel plant was *United States* v. *H. K. Porter Co.*, 296 F.Supp. 40 (N.D. Ala. 1968). Although finding that the seniority system perpetuated the effects of past assignment discrimination, the court declined to order the systemic seniority changes decreed in *Quarles* and *Local 189*. The court emphasized that it had no dispute with the propriety of those remedies in the tobacco and paper industries (*Id.* at 62-63), but found that they were inappropriate in light of the greater complexity of steel production (*Id.* at 63-72, see especially pp. 66-67).

Shortly thereafter, the Fifth Circuit had occasion to confirm the uniqueness of steel plants. Affirming the district court's decision in *Local 189* installing systemic seniority changes in a paper mill, *Local 189* v. *United States,* 416 F.2d 980 (5th Cir. 1969), cert. denied 397 U.S. 919 (1970), the court distinguished both *Whitfield* and *H. K. Porter* on the ground that the remedies mandated by Title VII for other industries were inappropriate for steel. The court stated that its holding in *Whitfield* had been predicated upon a finding that, in view of the widely divergent skill requirements between different steel plant lines of progression, the system adopted by the company and union "was conceived out of business necessity, not out of racial discrimination." 416 F.2d at 993. The district court's decision in *H. K. Porter* was distinguished because:

> "The record in that case, as the district court viewed it, showed that safety and efficiency, the component factors of business necessity, would not allow relaxation of the job seniority system. We see no necessary conflict between *Porter's* holding on this point and our holding in the present case." (*Ibid.*)

The next Title VII decision in the steel industry was *United States* v. *Bethlehem Steel Corp.*, 312 F.Supp. 977 (W.D.N.Y. 1970), involving the Lackawanna plant of Bethlehem. The court there found that the seniority system

perpetuated the effects of prior discrimination, and it recognized that decisions involving plants in other industries had awarded the plant seniority and rate retention remedies sought by the Government. (*Id.* at 993). Nevertheless, after reviewing "the history of the steel industry" (*Id.* at 994), the court declined to award such remedies, believing that they "would be arbitrary in . . . application and effect" and "would have adverse effects wholly out of proportion to the injustice which [they] seek [] to cure" (*Id* at 995).

The next steel industry decision was *Matter of Bethlehem Steel Corp.*, OFCC Dkt. 102-68 (Dec. 18, 1970), involving the Sparrows Point plant of Bethlehem. This case arose not under Title VII, but under the parallel antidiscrimination provisions of Executive Order 11246. Under that Order, charges of discrimination deemed meritorious by the Office of Federal Contract Compliance are referred in the first instance to a three-member Hearing Panel appointed by the Secretary of Labor. In its extensive decision, the Panel,[2] by a 2-1 vote, although finding that the seniority system perpetuated the effects of past discrimination, declined to award the plant seniority and rate retention remedies sought by the Government. The Panel applauded judicial awards of those remedies in other industries, but concluded that the unique attributes of steel production rendered those remedies inappropriate in the steel industry (*Id.* at page 48):

> "We must continue to bear in mind that Sparrows Point is not a small factory but is a vast complex of manufacturing operations. In fact, it constitutes a large complicated industrial community or society with an intricate and highly sensitive organization of relationships of production processes, maintenance relation-

[2] The Chairman of the Panel was Father Dexter Hanley of Georgetown Law School. The other panel members were Peter Seitz and Lloyd Bailer, both distinguished arbitrators.

ships, and above all, people. Changes in basic rules have far-reaching consequences.

"Thus, in the light of case law and reason, we conclude that we are asked to look to the viability of an economic enterprise; to the practical problems of the effects of the proposed guideline remedies [plant seniority and rate retention] upon production, safety, morale, and responsible labor relations, including collective bargaining obligations. We further conclude that in doing this we must be attentive to the special difficulties, history and needs of the steel industry and of the Sparrows Point plant."

The Panel then analyzed for eleven pages the testimony introduced by the company and the union as to "why these remedies would be unworkable at Sparrows Point and in the basic steel industry generally" (*Id.*, p. 48, see generally *Id.* pp. 48-59), and concluded upon that analysis "that a defense of business necessity has been made and that the imposition of the OFCC guidelines at the Sparrows Point plant would be arbitrary and unreasonable on the facts in this case." (*Id.* p. 59).

The Panel emphasized that it was not disputing the propriety of these remedies in other industries, but only in steel (*Id.* pp. 59-60):

"In saying that the OFCC guideline plan is not one well adapted for operation at Sparrows Point as appropriate relief for those continuing to suffer the effects of past discrimination, we do not mean to imply that such a plan may not have been an appropriate measure of judicial relief under the less complex and different circumstances before the courts in the Crown-Zellerbach [Local 189] and Quarles cases. Neither do we suggest that such a plan may not be appropriate and desirable as a means of eliminating the present effects of past discrimination in other cases that may arise in the future. Our deep concern stems from the fact that the simple

> yet abstract formula of the OFCC's guideline plan simply does not fit the circumstances of the highly sophisticated and complex industrial society represented in the collective bargaining agreement between the United Steelworkers of America (AFL-CIO) and Bethlehem Steel Corporation."

The Panel found "additional support for the foregoing conclusion in the fact that such a remedy as proposed by the Government has not been adopted in any case involving the steel industry" (*Id.* p. 60), citing the Fifth Circuit's decision in *Whitfield,* and the district court decisions in *H. K. Porter* and *Bethlehem (Lackawanna).* (*Id.* pp. 60-63).

It was not until June, 1971, with the Second Circuit's reversal of the *Bethlehem (Lackawanna)* decision, that any court declared the remedies of plant seniority and rate retention feasible in a steel plant, 446 F.2d 652 (2nd Cir. 1971). At the time of the Second Circuit's *Bethlehem* decision, *H. K. Porter* was pending on appeal to the Fifth Circuit. The appeal had been argued in April, 1970, but although the Fifth Circuit had issued innumerable decisions requiring the institution of plant seniority and rate retention in cases involving other industries which came before it subsequent to the *H. K. Porter* orgument, [2a] no opinion in *H. K. Porter* issued for four years.[3]

[2a] See, e.g. *United States* v. *Jacksonville Terminal Co.,* 451 F.2d 418 (5th Cir. 1971) (railroad terminal); *Long* v. *Georgia Kraft Co.,* 455 F.2d 331 (5th Cir. 1971) (paper mill); *United States* v. *Hayes International Corp.,* 456 F.2d 112 (5th Cir. 1972) (military aircraft manufacturing and repair plant); *Rowe* v. *General Motors Corp.,* 457 F.2d 348 (5th Cir. 1972) (automobile assembly plant); *United States* v. *Georgia Power Co.,* 474 F.2d 906 (5th Cir. 1973) (electrical power company); *Bing* v. *Roadway Express, Inc.,* 485 F.2d 441 (5th Cir. 1973) (trucking firm).

[3] Ultimately, following Judge Pointer's decision in the instant case, the parties to *H. K. Porter* agreed upon a remedy patterned after Judge Pointer's, and the Fifth Circuit disposed of the case by approving installation of the agreed-upon remedy.

Following the Second Circuit's *Bethlehem* decision, at a time when the Government, the Company and the Union were seeking to settle the instant case without trial, counsel for the Government and the Union (who were also counsel in *H. K. Porter*) wrote to the Fifth Circuit urging a prompt decision in *H. K. Porter,* explaining that the parties' ability to settle was hampered by the conflict between the Second Circuit's *Bethlehem* decision and the district court's *H. K. Porter* decision, and that "significant guidance . . . could be furnished by a decision in the *H. K. Porter* case."[4] Nevertheless, no decision was forthcoming in *H. K. Porter,* and the instant case proceeded to trial.[5]

---

[4] This letter stated in pertinent part:

"The Plaintiff in the above-captioned case, United States of America, and the Union defendant, United Steelworkers of America, AFL-CIO, are also parties to another Title VII Lawsuit, *United States* v. *United States Steel Corp.,* Civil No. 70-706, pending in the Northern District of Alabama which poses issues very similar to those in the instant case. Trial of that case is scheduled to begin in May, 1972.

The Plaintiff and the Union have begun preliminary discussions looking toward a means for resolving that suit without contested litigation. While the Plaintiff is of the view that the *Bethlehem Steel* decision, 446 F.2d 652, is to a significant extent, persuasive on the seniority issue, the parties' ability to resolve that issue in the *United States Steel* case is limited by their uncertainty as to the ultimate outcome of the *H. K. Porter* appeal.

Because of the importance of the *United States Steel* case, which involves more than 10,000 employees, we believe that the Court would wish to be made aware of the significant guidance which could be furnished by a decision in the *H. K. Porter* case."

[5] Similarly, despite the Second Circuit's decision, there was a protracted delay before the OFCC's appeal from the Panel decision in *Bethlehem (Sparrows Point)* was resolved. Although all briefs on that appeal had been filed by February, 1971, and the Second Circuit's decision issued in June, 1971, the Secretary of Labor did not issue his decision upholding the appeal until January 1, 1973, by which time the trial in the instant case had been concluded.

2. The District Court's Decision in the Instant Case

The trial of the instant case consumed six months, from June through December, 1972. The court ultimately found that the existing seniority system "perpetuated the effects of the pre-1963 discrimination" (App. 14), and concluded that a curative remedy could be fashioned which would be consistent with "business necessity" (App. 14-16).[5a] That injunctive remedy was installed by a 150 page decree entered in May, 1973 (App. 2).

However, with the exception of a relatively small number of employees whose claims the court regarded as special, the court declined to award backpay. Although writing two years before this Court's decision in *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975), the court correctly anticipated the central features of that decision: (1) that once discrimination has been proved, "successful plaintiffs should ordinarily be awarded backpay" unless there are special considerations which would render such an award "unjust," App. 17; (2) that "a claim for back pay cannot be defended on the lack of evil intent or even on a showing of good will," App. 24; and (3) that the question is one entrusted by the statute to the "equitable discretion" of the district court, App. 17.

The court believed that here two factors combined to render an award of back pay unjust.[6] First, it would be impossible to determine which employees, if any, had suffered from the absence of plant seniority and rate retention. As the violation here was a failure to install these remedies earlier, the purpose of back pay would be to "make whole"

[5a] As noted above, n. 1, the court's remedy had special features to deal with the unique safety and operational considerations existing in steel plants.

[6] Except in the case of three departments, where the court awarded backpay totalling over $200,000. The court also awarded attorneys fees in the amount of $205,000. App. 20-22, 27-28.

those who would have fared better but for the delay in their installation. But here we cannot know who those persons are. Only those who would have exercised the option of moving to other jobs could even arguably be entitled to a monetary remedy, and there was no evidence that such persons existed. Moreover, an employee who *did* exercise the option to move to another job might have fared worse —in terms of the amount of compensation he received— rather than better on his new job. "The ultimate conclusion, simply, is that in the particular context of this case the assessment of back pay for the pre-1963 discrimination systemically perpetuated by the effect of inhibiting seniority standards upon the bidding procedures would be fraught with speculation and guess-work" (App. 23). "If . . . an accurate determination—or even a reasonably accurate estimate—of individual rights is to be a cornerstone for back pay awards, then, with the exception of the three specific situations [where the court awarded backpay], this cannot be done in the present case, and most certainly not within the physical and fiscal limitations of the court" (App. 24).

The second factor rendering a backpay award unjust, the district court ruled, was that the defendants had reasonably relied upon the prior decisions holding that business necessity *precluded* installation of the plant seniority and rate retention remedies in steel plants. Here the parties had not simply acted in good faith; the courts had furnished them "good reason to believe that the seniority system at Fairfield, lauded in *Whitfield* . . ., also was consistent with Title VII, at least in this circuit," App. 25. While emphasizing that this latter consideration was not a defense to a finding of liability—and thus to the issuance of injunctive relief—the court found it to "merit some consideration, in equity, particularly where a purpose of back pay awards is to encourage nonjudicial solutions," App. 25).

As the court explained (App. 24):

"Here, the company—particularly at upper man-

agement levels—and the unions—particularly at the international level, and their representatives—have been in the forefront of expanding employment opportunities for blacks. There is no need to recount the evidence which establishes the many initiative steps taken by them to eliminate racial discrimination, albeit still falling short by today's standards. They have modified the employment practices at Fairfield periodically to comply with all legal requirements as from time to time they with reason understood them to be. The Steelworkers union was, in fact, active in obtaining support for passage of Title VII. They had good reason to believe that the seniority system at Fairfield, lauded in *Whitfield* v. *United Steelworkers,* 263 F.2d 546 (CA5 1959), also was consistent with Title VII, at least in this circuit.[44]

"[44] In *Local 189* v. *United States,* 416 F.2d. 980 (CA5 1969), the first appellate decision requiring a revision of a seniority system such as at Fairfield Works, the court saw no necessary conflict with the decision of the district court in *United States* v. *H. K. Porter,* 296 F. Supp. 40 (N.D.Ala. 1968), which had upheld such a system in the steel industry. The District Court in *United States* v. *Bethlehem Steel Corp.* (Lackawanna plant), 312 F. Supp. 977 (W.D.N.Y. 1970), concluded that remedies such as required in *Local 189* were inappropriate in the steel industry. A similar conclusion was reached by a Hearing Panel in the Matter of Bethlehem Steel Corp. (Sparrows Point Plant), OFCC Dkt. 102-68, issued December 18, 1970. Not until June 1971, was the *Bethlehem Steel* (Lackawanna) decision reversed by the Second Circuit, 446 F.2d 652. Even so, the *H. K. Porter* decision was then on appeal to the Fifth Circuit and, particularly in view of its treatment in the *Local 189* opinion, the strong possibility of a conflict in circuit decisions remained. An

effort was made on behalf of the parties in the case *sub judice* to obtain information, at least tentatively, as to the Fifth Circuit's decision in *H. K. Porter* for guidance at Fairfield Works, but the decision has not been rendered."

3. The Steel Industry's Response to the District Court's Injunctive Reforms

Judge Pointer's decree in the instant case, entered on May 2, 1973, provided the catalyst for an industry-wide solution to the seniority problems in the steel industry—a solution which was implemented before the appeal from the denial of back pay reached the court below. Shortly after Judge Pointer's decree was entered, the Union approached the major steel companies which bargain jointly with it, and suggested that the parties negotiate a proposal to be submitted to the interested Government agencies for an industry-wide solution of steel industry Title VII problems. After three months of negotiations, the Union and these companies reached agreement upon a proposal which they tendered to the Department of Justice, the Department of Labor and the Equal Employment Opportunity Commission. There followed six months of negotiations between these parties, eventuating in the filing of a lawsuit and two consent decrees, applicable to more than 240 steel plants, which were approved by Judge Pointer on April 12, 1974. *United States* v. *Allegheny-Ludlum Industries, Inc.*, 8 FEP Cases 198-199 (N.D. Ala. 1974).

The consent decrees were modeled after Judge Pointer's decision in the instant case, although in some respects they furnished even broader relief to alleged discriminatees. *United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 851 n.28 (5th Cir. 1975). The Fifth Circuit has declared that the consent decrees' injunctive provisions "implement the policies of Title VII and related laws to an

exceptionally thorough degree," *id* at 881, and has recognized this to be "one of those rare instances in which the government has, to its satisfaction, successfully negotiated a comprehensive voluntary accord," *id* at 848. Thus the Union and the Companies, upon learning that the early rulings that "business necessity" precluded the institution of seniority reform in the steel industry were wrong, promptly agreed to institute wholesale reforms throughout an entire industry, although at only a handful of plants had litigation even been initiated in the decade following Title VII's passage.

As part of the consent decrees, the Union and Companies will offer $30.9 million dollars to affected employees in the steel industry, of which approximately four million dollars is to be offered to employees at Fairfield. Regardless of the outcome of the instant litigation, the affected employees at Fairfield will have had an opportunity to be "made whole" to the tune of four million dollars.

4. The Court of Appeals' Decision in the Instant Case

Against this backdrop, the private plaintiffs prosecuted an appeal from the district court's denial of back pay. (The Government, although initially filing a notice of appeal, did not pursue it once the consent decrees were approved, advising the court below that it was satisfied with the monetary relief furnished by the consent decrees, App. 30).

The court below held that Judge Pointer "must be charged with an abuse of discretion" in limiting backpay as he did (App. 31). Construing this Court's decision in *Albemarle Paper* as imposing "a nearly certain, if not 'automatic or mandatory,' duty to award back pay to discriminatees who can prove their entitlement to monetary recovery" (App. 43), the court found both of the grounds relied upon by Judge Pointer, although factually correct, legally impermissible bases for denying backpay.

The court below acknowledged that, as Judge Pointer had found, it would be impossible to determine who had suffered, and in what amount, from the defective seniority system (App. 32-33, 39, 41-45). But the court thought it no ground for denying backpay that insufficiencies of proof rendered the district court unable to "award the back pay to the minority employees who . . . would have occupied" better jobs with a proper seniority system (App. 43). Rather, the "situation" requires a "quagmire of hypothetical judgments" (App. 44). Unable to determine *who* suffered, or to what extent black employees' lower earnings resulted from innocent causes rather than from the defects in the seniority system, the court should dispense back pay in "pro rata shares" to *all* the employees in affected groups. The court cautioned, however, that "alternative methods possessed of superior certainty should be exhausted before the court resorts to racially-drawn classwide comparisons or pro rata approaches" (App. 45).

With respect to the other ground relied upon by Judge Pointer, the court below agreed that "the union gleans respectable support for its contention" that the prior decisions had indicated that "the remedies of plant-service seniority and rate retention would not be applied to the steel industry due to the dangers and complexities of the steel manufacturing process," App. 48-49; nor did the court below dispute "Judge Pointer's finding that [the Union] 'had good reason . . . at least in this circuit,' 371 F. Supp. at 1062, to believe that the Fairfield seniority systems comported with the law," App. 49. But the court below concluded that the district court abused its discretion nonetheless in relying upon this consideration to deny back pay, App. 49-51. The court viewed the hardship befalling the Company and Union as one of "the usual risks of litigation," App. 50, and refused to "subvert" Title VII's "integral [backpay] scheme with a crazy-guilt pattern of different back pay liability dates, industry-by-industry, plant-by-plant . . .," App. 50-51.

REASONS FOR GRANTING THE WRIT

This case provides an important opportunity for this Court to elucidate the meaning of its decision in *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975). In *Albemarle,* this Court declared that the language of Section 706(g)—"with or without backpay"—vests district courts with equitable discretion in determining whether backpay should be awarded, a discretion which must be exercised in light of "the purposes which inform Title VII," *id* at 417. The court below understood *Albemarle* to impose "a nearly certain, if not 'automatic or mandatory' duty" to award back pay to those who suffer economic loss from a violation of Title VII. From that starting point, the court below proceeded to ignore a "well established" principle of equity: that it is unfair to visit a monetary award upon those who have reasonably relied upon prior decisions authorizing their conduct. *Lemon* v. *Kurtzman,* 411 U.S. 192, 199, 203 (1973):

> ". . . [S]tatutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct. This fact of legal life underpins our modern decisions recognizing a doctrine of non-retroactivity.
>
> * * *
>
> "It is well established that reliance interests weigh heavily in the shaping of an appropriate equitable remedy. *City of Phoenix* v. *Kolodziejski,* 399 U.S. 204 (1970); *Cipriano* v. *City of Houma,* 395 U.S. 701 (1969); *Allen* v. *State Board of Education,* 393 U.S. 544 (1969)."

This reliance principle has been consistently recognized in cases arising under the National Labor Relations Act, upon which the backpay provision of Title VII was "expressly modeled," *Albemarle,* 422 U.S. at 419. Whether the court below was correct in holding this principle inapplicable to

Title VII is a question which should be decided by this Court.

In *Albemarle,* this Court declared that "backpay is not an automatic or mandatory remedy; like all other remedies under the Act, it is one which the courts 'may' invoke." 422 U.S. at 415. But the Court warned that "important national goals would be frustrated by a regime of discretion that 'produce[d] different results for breaches of duty in situations that cannot be differentiated in policy,' " *Id.* at 417.

Accordingly, discretion must be exercised in light of "the purposes which inform Title VII," *Ibid.* The "primary objective" is a "prophylactic one": to provide a "spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices," and thus eliminate discrimination, *Id.* at 417-418. The other purpose is "to make persons whole for injuries suffered on account of unlawful employment discrimination," *Id.* at 418.

From these basic principles the Court evolved the following standards for measuring the exercise of district court discretion, *Id.* at 421-422:

> "It follows that, given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination. The courts of appeals must maintain a consistent and principled application of the backpay provision, consonant with the twin statutory objectives, while at the same time recognizing that the trial court will often have the keener appreciation of those facts and circumstances peculiar to particular cases."

Applying these standards to the district court's decision

in *Albemarle,* this Court held that the court had abused its discretion by relying upon the defendants' absence of bad faith—"under Title VII, the mere absence of bad faith simply opens the door to equity; it does not depress the scales in the employer's favor," *id.* at 422—but held that the court might have been acting within its discretion in denying backpay because of the plaintiffs' belated claim therefor, if the evidence disclosed that the defendants were prejudiced by the delay and that the plaintiffs' trial conduct was not excusable, *id.* at 423-424. If upon remand the district court again denied backpay upon this ground,

> "The standard of review will be the familiar one of whether the District Court was 'clearly erroneous' in its factual findings and whether it 'abused' its traditional discretion to locate 'a just result' in light of the circumstances peculiar to the case." *Id.* at 424.

Of course, if the defendants in *Albemarle* were exonerated because of the belatedness of the claim, the exoneration would not be vindicating either the "make whole" or the "prophylatic" objective of Title VII. But this Court recognized that in particular situations there can be countervailing equities which would not make a back pay award "a just result."

In the instant case, the district court concluded that a backpay award would be unjust. Such an award would not truly vindicate the "make whole" objective of Title VII, for—as the Fifth Circuit agreed—it is impossible to know who suffered, in what amount, and from what cause, so that any award would rest upon a "quagmire of hypothetical judgments." Nor would a backpay award vindicate the "prophylatic" objective of Title VII, for here the defendants *had* "self-examine[d] and . . . self-evaluate[d] their employment practices" (*Albemarle,* at 417-418): at great personal cost, in a violently hostile social climate, they had "been in the forefront of expanding employment opportuni-

ties for blacks," had taken "many initiative steps . . . to eliminate racial discrimination," and had "modified the employment practices at Fairfield periodically to comply with all legal requirements as from time to time they with reason understood them to be" (App. 25).

While a back pay award thus would little serve the objectives of Title VII, the district court found that it would be greatly inequitable because of a special consideration applicable only to steel plants: the uniform line of decisions advising the parties that business necessity *precluded* the installation of plant seniority and rate retention in steel plants, decisions upon which the parties had reasonably relied. Tailored as it was to this unique consideration,[7] the district court's decision was consistent with the Court's later admonition in *Albemarle* that back pay not be denied "for reasons which, if applied generally, would . . . frustrate the central statutory purposes." Ironically, the court below, in reversing, stood *Albemarle* on its head: it rejected the district court's approach precisely *because* it had narrow application. To the court below, the district court's approach would "subvert" the scheme of Title VII by creating "a crazy-quilt pattern of different back pay dates, industry-by-industry, plant-by-plant." Thus the court below shrank from the very uniqueness of the case which this Court declared in *Albemarle* to be the touchstone of the equitable discretion to deny back pay.

The district court's decision was consistent with, and the decision of the court below unfaithful to, well-established principles developed under the back pay provision of the NLRA, after which Title VII's back pay provision was "expressly modeled." *Albemarle,* supra, 422 U.S. at 419. As this Court explained in *Albemarle,* it is reasonable to

---

[7] There is no other industry which the courts have seen, at any time, as warranting an exception from the customary plant seniority and rate retention remedies.

assume "that Congress intended that Title VII's back pay provision would be implemented consistently with that of the NLRA," *Id.* at 419-420.

There have been numerous decisions under the NLRA holding that parties who have justifiably relied upon legal pronouncements in earlier cases will not be held liable for back pay for their conduct prior to the reversal of those pronouncements. *Retail, Wholesale and Department Store Union* v. *NLRB,* 466 F.2d 380, 387-393 (D.C. Cir. 1972) is representative. In that case an employer had relied upon a construction of the NLRA announced in several Board decisions; this Court subsequently issued a decision which required the Board to reverse its earlier construction; and the Board awarded back pay against the employer for its conduct prior to this Court's ruling.

The court of appeals reversed the award of back pay, holding that it would be inequitable to award back pay against an employer who had acted in reliance upon the state of the law as it then existed. Citing numerous decisions under the NLRA, the court noted that "courts have not infrequently declined to enforce administrative orders when, in their view, the inequity of retroactive application has not been counterbalanced by sufficiently significant statutory interests." *Id.* at 390. The court emphasized that the situation before it was not one in which the law had merely been uncertain, but rather one "where the Board had confronted the problem before, had expressed an explicit standard of conduct, and now attempts to punish conformity to that standard under a new standard subsequently adopted." *Id.* at 391. Noting that following the change in the law the employer had "moved promptly to comply," *id.* at 393, the court concluded that it would "work hardship upon [the employer] altogether out of proportion to the public ends to be accomplished" were the employer held liable for back pay for actions taken in reliance upon the previous state of the law. *Ibid.*

This principle—that those who justifiably rely upon legal pronouncements should not be required to pay back pay because they are subsequently overruled—has been applied in a variety of contexts over the course of the NLRB's history.[8]

The most recent application of this principle is *Lodge 743, International Association of Machinists* v. *United Aircraft Corp.*, —— F.2d ——, 90 LRRM 2272 (2nd Cir. 1975). There, the Court found that it would be "unjust" to assess backpay against an employer in circumstances far less compelling than the instant case. There had never been a prior decision squarely holding lawful the conduct in which the employer engaged, but there were decisions on analogous issues which the court believed furnished "a basis for concluding that the same rule should apply" to the employer's conduct, 90 LRRM at 2295. The Court believed that from a "reasonable reading of decisions existing" at the time of the employer's actions, "one could have concluded" that the employer was authorized to act as it did. *Id.* at 2296. Noting that the employer's actions were taken in good faith and on the advice of counsel, the court was "not . . . disposed to permit imposition of a substantial liability upon the Company." *Ibid.*

In one respect, the instant case presents a more compelling claim for exoneration than any of the NLRB cases.

---

[8] See, e.g., *NLRB* v. *Baltimore Transit Co.*, 140 F.2d 51, 55 (4th Cir., 1944), cert. denied, 321 U.S. 795 (1955); *NLRB* v. *Guy F. Atkinson Co.*, 195 F.2d, 141, 149 (9th Cir. 1952); *NLRB* v. *IBT, Local 41*, 225 F.2d 343, 348 (8th Cir. 1955); *NLRB* v. *E&B Brewing Co.*, 276 F.2d 594 (6th Cir. 1960), cert. denied, 366 U.S. 908 (1961); *Fibreboard Paper Products Corp.*, 138 NLRB 550, 555 n. 21 (1962), enforced, 322 F.2d 411, 415 (D.C. Cir. 1963), affirmed, 379 U.S. 203 (1964); *Kohler Co.*, 148 NLRB 1434, 1454 (1964), enforced 345 F.2d 748 (D.C. Cir. 1965); *Local 138, Operating Engineers*, 151 NLRB 972, 974 (1965); *Ferrell-Hicks Chevrolet, Inc.*, 160 NLRB 1692, 1695-98 (1966).

In none of the NLRB cases did the Board or courts tell the employer that he *should* act as he did, but only that it was *lawful* for him to do. Here, the courts told the Union and the Company that it was a "business necessity" for them to act as they did—that "the dangers and complexities of the steel manufacturing process" dictated foregoing plant seniority and rate retention. The courts thus had said more than that the defendants' course of conduct was *lawful;* they had corroborated the defendants' own belief that that course was a *necessity.*

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

BERNARD KLEIMAN
CARL B. FRANKEL
United Steelworkers of America, AFL-CIO-CLC
Five Gateway Center
Pittsburgh, Pa. 15222

MICHAEL H. GOTTESMAN
ROBERT M. WEINBERG
Bredhoff, Cushman, Gottesman & Cohen
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

JEROME A. COOPER
JOHN FALKENBERRY
Cooper, Mitch & Crawford
409 North 21st Street
Birmingham, Ala. 35203

Attorneys for Petitioner

APPENDIX

United States District Court,
N. D. Alabama, S. D.
Dec. 11, 1973.

UNITED STATES of America, *Plaintiff,*
LUTHER MCKINSTRY, et al., *Plaintiffs;*
WILLIAM HARDY, et al., *Plaintiffs;*
JOHN S. FORD, et al., *Plaintiffs;*
ELDER BROWN, et al., *Plaintiffs;*
ELEX P. LOVE, et al., *Plaintiffs;*
THOMAS JOHNSON, et al., *Plaintiffs;*
JAMES DONALD, et al., *Plaintiffs;*
JAMES FILLINGAME, *Plaintiff;*

v.

UNITED STATES STEEL CORPORATION et al.,
*Defendants.**

MEMORANDUM OF OPINION

POINTER, District Judge.

Consolidated trial of these Title VII cases[1] began in June, 1972. In December, 1972—after hundreds of witnesses, more than 10,000 pages of testimony, and over ten feet of stipulations and exhibits (the bulk being in computer or summary form)—the parties rested, subject to the submission of certain supplemental computer studies and analysis. Trial would have been even more prolonged but for the severance of one major issue (test validation) and for the very

---

* Consolidated with: McKinstry v. United States Steel Corp., 66-343; Hardy, 66-423; Ford, 66-625; Brown, 67-121; Love, 68-204; Johnson, 69-68; Donald, 69-165; Fillingame, 71-131.
Civ. A. Nos. 70-906, 66-343, 66-423, 66-625, 67-121, 68-204, 69-68, 69-165 and 71-131.

[1] The Fillingame suit, CA 71-131, brought by a white employee, is essentially a charge of unfair representation against the union. The other private suits, brought by black employees, make claims under 42 U.S.C.A. § 1981 as well as under Title VII.

professional attitude of all counsel in expediting trial.[2] A decree of over 150 pages was entered May 2, 1973, covering most issues; and on August 10, 1973, a final judgment was entered covering all remaining issues except that of test validation. This preface is given to explain why the court in this opinion has chosen not to deal with each aspect and issue but rather to focus on matters related to the few questions as to which appeal has been taken.[3]

OVERVIEW OF OPERATIONS AND ORGANIZATION

"Fairfield Works", one of the largest units of United States Steel Corporation, consists of nine plants in Jefferson County, Alabama. Two (Ore Conditioning; Coke & Coal Chemicals) process raw materials. Two (Ensley; Fairfield) are basic steel producing facilities, with some finished products. Four (Tin; Wire; Sheet; Bessemer Rolling) make finished products. The ninth[4] (Rail Transportation) provides rail transportation services for the other eight.

The plants came into being at different times, and some were initially under different ownerships. Ensley, the oldest part of the works, was started in 1886, while Ore Conditioning, the most recent, was constructed in 1939-40. The nine plants now form a single interrelated steel producing operation, with operation responsibility vested in a General Superintendent. His principal managerial assistants, called Division Superintendents, have functional responsibilities which may include operations at more than one plant.

Similarly, union organization—and subsequent management recognition—occurred at different plants at varying times during the late 30's and early 40's. Two locals of the Steelworkers represent

---

[2] For example, on one day the court was able to hear over 60 witnesses relative to a narrow dispute of fact. Rarely was the court called upon to rule on matters of authenticity of documents.

[3] The court has been advised that the appeals are limited to back pay and earnings retention ("red circle") issues. While this opinion is filed subsequent to entry of judgment the essential findings and conclusions were communicated to the parties prior to the judgment in a series of informal conferences.

[4] The term "plant" is a misnomer for Rail Transportation but is nevertheless used in this opinion of convenience.

production and maintenance (P & M) employees of the Rail Transportation plant; a separate Steelworkers local represents P & M employees at each of the other eight plants. A separate Steelworkers local represents plant protection employees throughout the works, and another represents the unionized clerical and technical (C & T) employees works-wide.[5]

In recent years the basic principles for employment of P & M employees have been established in triennial industry-wide negotiations leading to, *e. g.*, the 1965 Basic Steel P & M Agreement. These principles have, however, since 1953 been modified on a local basis through the adoption of "local seniority rules and regulations", in which the various locals have asserted their independence in collective bargaining. The consequence is that, though the basic principles are similar, there are ten separate arrangements governing seniority for P & M employees at Fairfield Works, as well as a separate arrangement for plant protection workers and one for the unionized C & T employees. It should be noted that employees holding trade and craft (T & C) positions in a plant are part of the same local which represents non-T & C employees at that plant and are subject to the same collective bargaining agreement, though with some special provisions for T & C jobs.

In the steel industry in general, and at Fairfield Works in particular, there are significant fluctuations in operational requirements and, hence, in manpower levels. Some jobs may be worked on a three-shift-a-day, seven-day-a-week basis ("21-turns"), and then at other times worked one-shift-a-day, five-days-a-week by a single man or crew ("5-turns"), or even completely halted, with a variety of intermediate manning levels. Within a given plant one operation may be on a 21-turn basis and another, during the same period, on a 5-turn basis. This fluctuation constitutes a major factor in the study of the "system" at the works and, in turn, is dealt with at length in the collective bargaining rules.

On a relatively busy day one would expect to find some 12,000

---

[5] The United Steelworkers of America, AFL-CIO-CLC, and the twelve Steelworkers locals constitute, along with the company, the defendants in this litigation. Three other unions, not named as defendants, have represented a limited number of employees in specialized operations.

persons on the job[6] at Fairfield Works, of which some 27% would be black employees.[7] P & M employees constitute the bulk of the work force—typically some 3,100 blacks and 6,000 whites—and, accordingly, it is not surprising that this litigation has tended to focus principally on employment practices and conditions concerning P & M employees.

There are over a thousand P & M positions, most of which are filled by more than one employee on a given day. These positions have a technical name generally descriptive of their principal function, e. g., "Rail Straightener Helper", and frequently have a shop name, e. g., "Gagger". Each position has a prescribed job class level, e. g., "JC 4", which determines the relative wage scale for that job in comparison with other jobs.[8] Most, but not all, positions have production-oriented incentive pay arrangements, either

---

[6] There would be several thousand additional employees either sick, on vacation or leave, or on lay-off.

[7] The record of the company in hiring blacks over the years is sufficiently good that in none of the suits is there a general claim of discrimination in hiring. There is a claim of discrimination as to hiring for certain types of jobs (*e. g.*, supervisory) and as to initial assignment of blacks disproportionately to less desirable plants. On this latter claim the court finds from the evidence no such discrimination since July 1965; and on the first claim the court has included in the decree provisions to mandate judicially parts of the company's "Affirmative Action Compliance Program."

[8] The job class levels, which range from a low of JC 1 to a high of JC 30, were established in the late 40's and early 50's as an outgrowth of a wage inequity study program initiated under the auspices of the War Production Board and conducted on an industry-wide basis. The levels were established after a consideration of a number of factors inherent in the jobs as performed at the time of the study, *e. g.*, physical effort, mental effort, skills, responsibility, working conditions, et cetera. The industry—companies and unions—has agreed not to reevaluate these ratings except where the factors have changed since the time of the study. At triennial bargaining sessions the actual hourly rate for each job class level is determined by negotiation; *e. g.*, under the 1971 agreement the hourly rates start with $3.385 for JC 1 and rise to $5.905 for JC 30. While agreeing not to reevaluate JC determinations for particular jobs absent a change in the job content, the parties have occasionally negotiated "differentials" for "out-of-line" or special situations (*e. g.*, trade and craft).

direct or indirect, some by individual performance and others by crew or group productivity. The differences between these negotiated incentive plans may be quite significant: for example, a JC 2 position with a "good" incentive plan may be more attractive financially than one rated JC 6 with a "poor" plan. Of course, the earnings of any individual P & M employee are also dependent upon how many hours are worked and when (*e. g.*, overtime, shift premiums, and Sunday and holiday premiums).

SENIORITY SYSTEM

Within each plant the higher paying jobs—virtually all in JC 5 or above, and some in JC 4—are grouped for promotional and retention purposes in ladder-like sequences called lines of progression or promotion (LOP).[9] The groupings generally, but not always, are composed of occupations which work together on some process (e. g., feeding and operating a rolling machine) or which perform similar functions (e. g., maintaining production or inventory records). For the most part the upward sequence is from the lowest JC occupation in the line to the highest; but, here again, there are numerous instances in which a higher job in the LOP may, whether by reason of its JC level, incentive plan, or otherwise, be a lower paying job in practice than one or more of those below it.

When a vacancy arises in a job in an LOP, those persons on the immediately preceding rung of the ladder are entitled to first consideration. If one of these persons is selected, this may create a vacancy on that step of the ladder, which in turn is filled by pro-

---

[9] Composition of the several hundred LOPs in Fairfield Works varies widely. Many have but one job (which eliminates the promotional aspect of the LOP concept). Some are long lines, with the bottom job(s) being JC 4 and, after many intervening occupations, a top job as high as JC 30. Some LOPs have a top job below JC 10; others have their bottom job above JC 10. Some have multi-manned jobs, a number of employees working the same job at the same time; others have but one employee filling each level of the ladder. Most LOPs are ladder-like; but some have one or more branches, which may or may not reunite. Some treat several jobs as being on the same level or even as the same step of the ladder; others treat each job as a new step even if there is no change in earnings.

motion of a person on the next preceding rung, etc. If this process ultimately produces a vacancy on the bottom step of the ladder, it is filled by bringing a new employee into the LOP.

The selection of which of several employees on the same step of the LOP is to be promoted is essentially[10] a question of which is the "oldest" employee. At this point a generalization as to works-wide practice can no longer be made; for under some local plant rules the oldest employee is the one who has been on the preceding job longest (occupational seniority), while in others it is the employee with longest service in the LOP (LOP seniority), in the department (departmental seniority), or in the plant (plant seniority).

In most plants the method for determining age for promotional purposes is also used to determine age for the purpose of job entitlement on reductions and increases in manpower levels. The younger or junior employee so determined, is, in a work reduction, "rolled back" to the next lower job or jobs in the LOP until his age is sufficient to allow him to "hold", thereby displacing at that point a junior employee who then in like manner rolls back into lower jobs or into the pool. The process is, in essence, reversed on an increase in manpower levels. There are various special rules, not identical for all plants nor necessarily uniform within the same place, to cover particular situations; such as where a younger employee is for some reason holding a higher job in the LOP, or where an employee prefers "going to the street" and taking supplemental unemployment benefits (SUB), or where an LOP contains lower jobs that, due to prior mergers of lines or otherwise, the employee has not previously worked. There are special rules covering temporary assignments and delineating between those vacancies considered permanent and those deemed temporary.

The lower rated jobs, except in the Ore Conditioning Plant, are grouped into pools, which generally correspond to geographical

---

[10] Under the contracts age is the determining factor only where ability to perform the work and relative fitness of the competing employees are relatively equal. In practice most vacancies are filled in accordance with the age factor.

divisions or departments in the plant.[11] These offer no promotional opportunities as such;[12] rather they are essentially "waiting" jobs—more menial jobs to which employees are assigned while they wait to get into, or return to, an LOP job. Assignment of pool employees to temporary vacancies in LOPs is left to the discretion of management, the evidence indicating that the principles employed in making such assignments vary from one supervisor to the next.

Permanent vacancies in an LOP which are not filled by employees already in that LOP[13] are filled by a bidding system specified in the collective bargaining agreements: the vacancy is "posted"; interested employees, whether in the pool or from other LOPs, can bid on the vacancy; the company is then required, assuming relatively equal abilities and fitness, to select that bidding employee with the most plant service where the job is located. A grievance and arbitration procedure is spelled out in the contracts; and the evidence demonstrates that the unions have, in promotional

---

[11] The basic concept of the pools, which were established in 1962-63, is not challenged by the United States or the private plaintiffs. The pools provide better protection against layoff than existed prior to their creation, utilizing plant age to determine entitlement to a pool job. In a sense the pool jobs represent a bottom job for all lines of promotion.

[12] There is a limited form of promotional opportunity within a pool. The Company and local union have classified the jobs in each area pool according to their relative desirability (from the standpoint of earnings, exertion and working conditions). The employees on pool jobs having the longest service in the area which the pool covers are entitled to a job with Job Desirability Level 1 (most desirable), those with the next longest such service to JDL 2 jobs, and those with the least such service to JDL 3 jobs. The selection of which job in the applicable JDL an employee is assigned has been left to management's discretion.

[13] Those with recall rights to the LOP are first offered the position before it is bid. It may be noted that, while most frequently it is the bottom job in the LOP that is posted, on occasions (for example, when employees lower in the line decline the promotion or when there is a large upturn in the level of operations) some intermediate job or jobs in an LOP may also be filled by the bid procedure.

disputes as well as in other matters, fairly pursued such remedies for the employees without regard to their race or color.[14]

A significant degree of choice is reserved to the individual employee. He[15] may decline to bid from the pool or another LOP on a posted vacancy in an LOP to which, based on plant age, he presumably would be entitled. He may decline to take a permanent promotion from a job in an LOP to a higher job in that line. He is usually allowed to decline to accept a temporary assignment, whether that be a step-up in his own LOP or an opportunity given a pool employee to work on an LOP job. He may, after having declined such opportunities or assignments in one or more occasions, change his mind when the situation is next again presented.

Each LOP is, in essence, separate from all other LOPs, without transfer rights except through the bid procedure,[16] which generally means starting at the bottom of the ladder and, under the occupational and LOP age systems, as a "new" man. In practical effect this means that an employee's promotional history, at least in retrospect, is to a significant degree preordained by the LOP which, through the voluntary bid system, he successfully chooses to enter.

---

[14] This is particularly significant in matters such as promotional disputes because the union will generally find itself urging a position that, at the same time, is adverse to the best immediate financial interest of another of its members. In making this finding and conclusion, the court is not expressing agreement with the result of each grievance about which some evidence was presented at trial, nor is the court saying that in each such dispute was any racial discrimination corrected. Rather, the court is saying that in the handling of grievances there has been no racial discrimination as a systemic matter, allowing for the possibility of some isolated aberrations.

[15] The masculine gender is used throughout this opinion for convenience. It should be noted however that the company has a number of female employees, including many in P & M jobs. This litigation does not involve any charges of sex discrimination, nor does the court imply that there is any evidence of such discrimination. However, in framing its decree, the court has attempted to avoid any provisions that would result in such discrimination or tend to perpetuate the effects of past discrimination, if any, based on sex.

[16] As an exception, the company and union in the Sheet plant have provided a link between units 123A and 125A.

At the time of making his choice of LOPs he can do little more than guess as to his future.[17] An LOP which at the time appears to be most promising may, due to differences in the health or circumstances of other employees, in technological advances, in the demand and competitive situation for particular products, et cetera, provide in fact fewer opportunities than LOPs which he chose to turn down. Even within an LOP he may find himself confronted with a similar dilemma when the line divides into separate branches. The point of the foregoing is not to condemn as such the seniority system, but rather to emphasize that *choice* and *chance* play a vital role in the system—and are, indeed themselves major elements of the system which this court is called upon to evaluate under the provisions of Title VII and 42 U.S.C. § 1981.

PERSPECTIVE

In this litgiation the court is looking not at a still photograph, but rather at a motion picture, one which pans across nine plants in Jefferson County, Alabama, and occasionally picks up activities in Pittsburgh or on a college campus. It commences many years before passage of the 1964 Civil Rights Act. Nor has it ended with the institution of these suits; indeed, it continued to run during the five months of trial such that a frame of July 1972 had undergone changes when compared with one in December of that year. In like manner, the court is asked to fashion remedies by estimating what this motion picture can depict in the months and years ahead.

With over 10,000 employees, the number of interactions between employees and of possibilities for employment disputes becomes, over a period of years, rather astronomical. Given the racial composition of the work force, it is not surprising that a very large number of disputes would be considered by one or more of the participants as having racial implications. Indeed, it is understandable that black employees, having experienced various forms

---

[17] For example, in 1968 Oscar Beaton was the successful bidder in two separate LOPs. His choice (contrary to his foreman's advice) has resulted in a $1,200.00 loss (comparing his earnings to those of the employee who advanced to the other job on his declination) in a three year period, and quite likely with result in further losses in the years ahead.

of direct and indirect racial discrimination in other areas of life, would frequently perceive any disappointments in employment matters from a like perspective. To accept this as so does not mean, of course, that their perceptions are either always correct or never correct.

The court's attention in this litigation[18] is directed however not to individual complaints as such, but to charges of discriminatory procedures, policies, and continuing practices. The focus is upon a system, not upon the isolated aberrations therefrom as such. The system, of course, involves not merely a study of rules and procedues, whether express or implied, but also a consideration of how these work in application. There is evidence, for example, that George Davis, a black millwright, may have the wrong seniority date. The applicable rule has been that his "age" is to be computed from the time he became a millwright helper, and he says that he became a helper earlier than the date shown for him on the seniority lists. While not called upon to determine the merits of each such complaint, the court can, however, conclude from the evidence concerning Davis and others that (1) one of the attributes of the system is that it is not perfect—the possibility of error is indeed a part of the system; (2) the system provides mechanisms for the correction of errors (*e. g.*, the grievance procedure and collective bargaining); and (3) the corrective mechanisms are themselves imperfect.

The focus of this litigation is whether this imperfect system, with its imperfect correcting mechanisms, meets the standards imposed by law and, to the extent it does not, how such should be corrected. So, we are concerned about the "age" of George Davis not to correct an error in his seniority date, but rather to evaluate the system and its elements. If the number of like incidents is sufficiently high, we may take this to be characteristic of the system and, if it tends to affect blacks to a greater degree than whites, we are called upon

---

[18] Of course, an action can be brought respecting a single, isolated act of discrimination under 42 U.S.C.A. § 2000e-2. But each of the private plaintiff cases here involved has a broader scope. It is doubtful that the court could have physically managed the litigation if each possible claim of individual discrimination had been pressed through the vehicle of these cases.

to view the system in this respect as racially discriminatory and provide rectification.

Seniority questions in a real sense are not matters of the company or the union "doing something" to somebody else, but rather disputes between two employees or groups of employees in which a major objective of company and union is to survive unscathed. Yet the perspective of the plaintiffs (as well as white employees) frequently is that "they"—meaning the company or union or both —did something or failed to do something. But the plaintiffs and the other employees are in many respects part of the "they", whether as employees of a corporation which can only act through its agents, or as members of a union which likewise is ultimately dependent upon the actions of its members.[19]

It is easy enough to hold that policies established by the work's General Superintendent are those "of the company". At lower echelons the answer is more difficult. For example, the racial prejudice of a turn foreman translated into action by the unfair assignments of temporary work, or of some skilled white workman in refusing to give training to a black employee, is discrimination. But when such actions are contrary to established policy of the company, a policy which upper management attempts to enforce within means reasonably available, these should not, it seems, be taken as company action,[20] that is, insofar as representing any policy or procedure of the company.

When is a procedure racially discriminatory? Only when the impact falls solely on black employees? Only when the beneficiaries of the practice are solely white employees? If affirmative answers were to be given, very few, if any, of the plaintiffs' claims could be

---

[19] In this connection it is not without significance that the unions at the Wire plant and Bessemer Rolling Plant are dominated by black members.

[20] A distinction can be drawn between an unintended or accidental act and an intended act which, though without bad motives, produces a proscribed result. *Cf.* Griggs v. Duke Power Co., 401 U.S. 424, 432, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), and Rowe v. GM Corp., 457 F.2d 348 (CA5 1972). This is not, of course, to rule that an individual claim under Title VII cannot be predicated on an action by a foreman in the scope of his employment.

sustained. This court concludes to the contrary, that a practice or procedure which has mixed racial effects may nevertheless be presumptively violative of Title VII where the benefits or detriments therefrom bear a significant correlation to race. It should be noted that efforts to correct such situations can likewise be expected to produce benefits and detriments which do not completely follow racial lines.

Finally, this court must continue to remind itself that the principles governing this industrial community were not divined in the sanctuary of a theoretician's office, but rather to a large extent were evolved through trial and error over a long span of time by people having to live with the consequences.[21] So then, the court should be wary of adopting a cavalier attitude towards unnecessary alterations in the basic fiber and structure of this community, while at the same time keeping in mind that the "business necessity" doctrine means that what the words denote and that these long-standing rules "do not, *per se,* carry the authoritative imprimatur and moral force of sacred scripture, or even of mundane legislation." United States v. Jacksonville Terminal Co., 451 F.2d 418, 454 (CA5 1971).

DISCRIMINATION

The foundation for this litigation rests upon the undisputed fact that at Fairfield Works a policy of segregation was generally followed until the past decade. Most LOPs were segregated, with the black-only and few racially-mixed lines containing, not surprisingly, most of the less desirable jobs and none of the highest paying ones. There were few black employees in T & C positions, and none in clerical and technical jobs, plant protection occupations, or managerial and supervisory positions.

In the early 60's, however, largely in response to Executive Order 10925 and Whitfield v. United Steelworkers, 263 F.2d 546 (CA5 1959), non-discrimination became the announced official

---

[21] Note also that the older practices, developed when there was direct segregation of most P & M jobs, were not themselves racially motivated—they rather were dealing with relative seniority between employees of the same race.

policy at the works. By 1963, the company and unions had established the system, previously described, for pooling the lowest paying jobs and for open bidding into the LOPs. They also had begun a program for merging LOPs, a program under which, ultimately, a majority of the formerly all-black and racially-mixed lines were merged into formerly all-white ones.[22]

The formal opening of the door did not, of course, constitute an immediate panacea for all blacks whose employment opportunities had been so long restricted. A number of contributing factors can be identified as explanation of why the change in announced policy was somewhat less than what it was advertised, and perhaps expected, to accomplish: the actual loss of seniority on changing LOPs . . . the fact that entry-level LOP jobs sometimes involve a reduction in overall-earnings . . . the belief, due in large part to confusion over the rules, that there were other disadvantages to bidding into a new line . . . the rejection of some black bidders through application of the ability and fitness standards . . . the skepticism and suspicion by many blacks as to the reality of new opportunities . . . the disapproval and resistance expressed by many white employees to such changes . . . the unwillingness, particularly among older black employees, to leave familiar conditions, to assume greater responsibilities, or to be considered troublemakers . . . the inability, again particularly among the older employees to learn new skills . . . etc. Furthermore, enjoyment of these new opportunities was directly dependent upon vacancies coming open; and the overall manpower levels at Fairfield Works have generally been on the decline during the past decade.

The point is that, while the 1962-63 changes represented a truly

---

[22] Mergers were generally accomplished by tacking formerly black or mixed jobs to the bottom of existing white lines. This, however, was understandable because such jobs, as noted, were typically the lower-paying less-skilled ones. It is in the placing of intermediate jobs, in the establishment of 1A-1B (see *infra*) lines, and in the failure or delay in merging lines that active (as distinguished from passive perpetuating) discrimination can be seen.

radical alteration in the employment practices at Fairfield,[23] some passage of time was needed for these processes to begin transforming the statistical profile, at least as viewed by an outside observer.

It is clear that on July 2, 1965, the effective date of Title VII, the basic principles of the seniority system in effect at Fairfield were not "actively" discriminatory.[24] It is likewise clear that in many respects this system, in violation of Title VII, has perpetuated the effects of the pre-1963 discrimination. Local 189 v. United States, 416 F.2d 980 (CA5 1969).

The sequential arrangement of jobs in a line of promotion has a tendency, by its very nature, to prolong the effects of a prior restriction of blacks to lower jobs, as does the judicial impediment to "bumping" incumbents. However, when supplemented by a standard that uses occupational or LOP age to measure promotions or retention priority, the secondary position of blacks becomes fixed—initially behind, they will remain behind their white contemporaries in progressing up the ladder towards better jobs. Use of LOP age produces similar results where, as here, the past discrimination involved segregated lines; and even departmental age has like consequences where, as here, black employees were not assigned, in the past, proportionately among all departments.

INJUNCTIVE RELIEF

The principal remedial step directed by the court to alleviate this situation has been to mandate the use of plant age in measur-

---

[23] These changes pre-dated most of the dramatic changes in education, housing, public accommodations, etc. Responsible leaders for the company and unions were, according to the evidence, subjected to threatening and abusive communications, vilification generally in the community, and hanging in effigy. Ten years later, when the battle-cry has changed such that it typically begins, "We're not fighting integration, but . . .," there is a tendency to block out the memory of what was said and done in the early 60's.

[24] Plaintiffs do not really seek to posit a cause of action under 42 U.S.C.A. § 1981 on pre-1963 acts in view of the statute of limitations question. See Buckner v. Goodyear Tire, 339 F.Supp. 1108 (N.D.Ala.-1972), aff'd, 476 F.2d 1287 (CA5 1973).

ing seniority for promotion,[25] retention, and recall purposes.[26] Also, the court directed forty-one additional mergers of LOPs, primarily to increase promotional opportunities. In a large number of LOPs other changes were directed, as by transferring one or more occupations from one line to another, or by altering the relative position of some jobs (to correct the typical placements of formerly black jobs below comparable white jobs), or by "boxing", "blocking", or connecting jobs in a line in such a way as to provide the equivalent of job skipping where not contrary to business necessity shown by the evidence.[27] The 1A-1B concept was ordered abolished.[28]

To increase the number of occasions in which these new rights may be exercised in conformity with the principles enunciated in

---

[25] For promotional purposes there is a year's waiting period before plant age may be used by a new entrant into an LOP. This is to insure a minimum period for training and experience before rising to more responsible positions in the line. As shown by the evidence, a failure to require such a period not only would create a significant hazard to personnel and equipment, but also would have substantial adverse effect under the production-oriented incentive plans on the compensation of other employees, including members of the plaintiff class. By other provisions of the decree the pre-1963 black employees choosing to enter a new LOP are, however, granted earnings protection in their new line during this waiting period.

[26] Use of plant age, or even company age, would not necessarily be an appropriate remedy if the company had been guilty in the past of racial discrimination in hiring. There is no evidence in this case of any such discrimination regarding P & M jobs.

[27] The court does find and conclude from the evidence that business necessity has been shown and established for the basic principal involved in the line of promotion concept and that, in the particulars where not so shown, the same could be corrected without discarding the principle itself.

[28] Many "mergers" of lines were effected by tacking a formerly black line near the bottom of a white LOP, but as a separate root or branch. The top jobs in such a 1B branch were to have, on paper if not always in practice, a priority to entry-level vacancies in the 1A branch, though without any credit for time spent in 1B jobs. In many of these situations this concept was coupled with the incorporation of "Rule VII-A-1-a", which, at least on paper, gave whites up in the 1A line the right to roll back into IB jobs on reductions in force.

Local 189 v. United States, *supra*, the court has directed that opportunities for promotion be afforded not only in the event of the death, retirement or promotion of other employees, but also with appropriate safeguards[29] in recall situations following force reductions of at least fifteen days. For like reason, the court has, in view of the very limited promotional opportunities potentially available in the Bessemer Rolling Mill and in the Maintenance of Way Department of the Rail Transportation Division, directed that such LOPs be realigned as departments in the Fairfield Steel plant, with a carry-forward of their former plant age for use in bidding on jobs in other LOPs in their new plant.

Temporary assignments of pool employees to LOP jobs are significant both in terms of increased interim earnings and in view of the training afforded thereby. To assure fair treatment, the court has directed the company to utilize plant age in determining the pool employee to fill a temporary vacancy in an LOP in the area served by that pool.

Across-the-board, uniform, color-blind modifications in the seniority rules, such as summarized in the three preceding paragraphs, do not in every particular erase the continuing effect of past discrimination. Accordingly, special remedies—as by requiring training and testing for certain craftsman occupations and by judicially mandating portions of the "Affirmative Action Compliance Program" promulgated by the company—have been incorporated in the court's decree to rectify the impact of past discrimination in T & C positions, C & T occupations, and supervisory jobs. A significant feature of these provisions is that, while the company is not required to appoint an unqualified person to such positions, yet it may not reject as unqualified a black applicant who possesses qualifications equal to those which were possessed by any white applicant for the same or like position who in the past was selected and who has performed successfully in such position.

---

[29] A few jobs—those in which a high degree of skill is required on the most responsible jobs in a given operation—have been designated as "critical" jobs and excluded from those in which periodic reshuffles may occur as a consequence of increases and decreases in the work force. This protection, deemed essential if reshuffling is to be allowed on other jobs, is limited to the manning levels during normal operational levels.

To minimize unnecessary confusion and turmoil and to assure accurate dissemination and understanding of the court's decree of May 2, 1973, two complementary provisions were included in the order. First, a ninety-day delay was provided for most of the substantive changes in the seniority system.[30] Secondly, and equally important, the court established an on-the-site three-member Implementation Committee, consisting of a knowledgeable representative of the company, of the unions, and of plaintiff class. In addition to acting as a communications link, the Implementation Committee is available to monitor the grievance procedures for possible deviation from the principles established by the court decree and has assisted in the preparation of plans for upgrading to journeyman status certain black employees in conformity with the court's decree.

BACK PAY AND FUTURE PAY

Back pay is properly viewed as an *integral* part of the whole of relief, which seeks not to punish the defendant,[31] but to compensate the victim of discrimination. United States v. Georgia Power Co., 474 F.2d 906 (CA5 1973). *Cf.* Moody v. Albemarle Paper Co., 474 F.2d 134 (CA4 1973) (in view of strong congressional policy successful plaintiffs should ordinarily be awarded back pay unless special circumstances would render the award unjust).

This policy, however, is one that guides the court in its exercise of equitable discretion.[32] Monetary awards must nevertheless be

---

[30] The dissemination process was accomplished more rapidly and with fewer problems than had been anticipated; and, accordingly, many of the changes were, by agreement of the parties and with the court's approval, put into effect prior to the August 1, 1973, deadline.

[31] But see United States v. N. L. Industries, 479 F.2d 354, (CA8 1973) in which the court indicated that the deterrent effect of back-pay awards, spurring other employers and unions to initiate corrective measures, is more important than the compensatory role. This comment sounds much like punitive damages.

[32] Concluding that the award of back pay in these cases is but a part of an equitable procedure, the court has denied any right to a jury trial. Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122 (CA5 1969); Lynch v. Pan American World Airways, Inc., 475 F.2d 764 (CA5 1973).

made only for actual damage. Lea v. Cone Mills Corp., 438 F.2d 86 (CA4 1971); Moody v. Albemarle Paper Co., 474 F.2d 134 (CA4 1973). While equity may for purposes of injunctive relief presume damages from the invasion of a legal right, United States v. Hayes Intern'l Corp., 415 F.2d 1038 (CA5 1969),[33] traditionally the courts have required, as a prerequisite to compensatory monetary awards, both proof that the claimant has actually sustained a loss from the defendent's improper conduct and evidence from which the amount of such damage can be determined with a reasonable degree of accuracy. See United States v. Huff, 175 F.2d 678 (CA5 1949); Blake v. Robertson, 94 U.S. 728, 24 L.Ed. 245 (1877); Philp v. Nock, 17 Wall. 460, 84 U.S. 460, 21 L.Ed. 679 (1873). The question becomes what evidence is sufficient for these purposes and, of necessity, what party has the burden of proof with respect thereto.

"Statistics often tell much, and Courts listen." Bing v. Roadway Express, Inc., 444 F.2d 687 (CA5 1971). An argument can be made on the basis of the opinions in Cooper v. Allen, 467 F.2d 836 (CA5 1972) and Hodgson v. First Federal Savings & Loan Ass'n, 455 F.2d 818 (CA5 1972), that evidence, such as statistical data, which would suffice to shift the burden of proof[34] to the defendant respecting the alleged discrimination by the employer, would likewise shift such burden to the defendant respecting the claim for back pay. In *Cooper* and *Hodgson,* however, both of which involved claims of discrimination by applicants who were refused employment, the real controversy was not whether the plaintiffs had been injured, but whether such injury was the result of discrimination.

The array of statistical evidence presented in this case by the plaintiffs strongly indicates that the effects of past racial discrimination have been perpetuated by the employment practices at Fairfield Works, and the court has placed great weight upon such evi-

---

[33] Also see 42 Am. Jur. 2d Injunctions § 29.

[34] The distinction between the burden of going forward with the evidence and the burden of persuasion, each sometimes meant under the label "burden of proof", is frequently blurred, even in cases which specifically deal with the issue. See, *e. g.,* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

dence both in finding statutory violations and in tailoring injunctive relief to remedy the same. But proof that these practices have discriminated *on the whole* against black employees—or, stated another way, discriminated against the "average" black employee —is not evidence that William Hardy,[35] for example, has been damaged by a violation of Title VII. Nor, at least in the absence of evidence supporting punitive action for willful misconduct, does the class action device transform individual claims into a "fluid" claim for the class as a whole. Cf. Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (CA2 1973), cert. granted 414 U.S. 908, 94 S.Ct. 235, 38 L.Ed. 2d 146 (1973).

The applicable rule has been stated by the Fifth Circuit as follows:

> But, back wages are not to be automatically granted whenever a person is ordered reinstated. The wages sought must be "properly owing to the plaintiffs." This requires positive proof that plaintiff was ordinarily entitled to the wages in question and, being without fault, would have received them in the ordinary course of things but for the inequitable conduct of the party from whom the wages are claimed. Jinks v. Mays, 464 F.2d 1223, 1226 (CA5 1972).

This principle was, by quoting the foregoing with apparent approval, held applicable to Title VII cases in United States v. Georgia Power Co., 474 F.2d 906, 922 (CA5 1973), the court noting that a finding of racially disproportionate earnings due to em-

---

[35] Hardy, lead plaintiff in the first private action filed, is a significant example for the reason that he was a member of a group, blacks in the Blast Furnace Department of the Ensley Steel plant, with respect to which the evidence was sufficient to show injury from discriminatory practices on which individual damage claims were susceptible of fair approximation. Yet, when the lengthy "flow charts" were prepared showing the impact which the court decree would have made had such provisions been instituted by the parties back in July 1965, it turned out that Hardy himself had not been damaged by the old system, but indeed had greater earnings under it than the new system would have produced. The back pay awards were limited, of course, to those who had been injured, and accordingly Hardy himself got no benefits from the back pay award in favor of members of the class which he represented.

ployment practices is not by itself a proper premise for the making of a back pay award. Thus, in Bing v. Roadway Express, Inc.,[36] 485 F.2d 441 (CA5 1973), where one employee was found to be entitled under the evidence to back pay, other claimants were not: "The other four are not entitled to back pay because . . . even if Roadway had not been discriminatory, they could not have obtained road jobs earlier than they did. Therefore they suffered no financial loss from Roadway's discrimination." At 452. In a case such as the one *sub judice,* where employee initiative and choice are critical factors in the job selection process, it seems clear that the burden of proof must, consistent with traditional rules of jurisprudence, be placed on the claimant to establish his injury and damages.

In three situations this burden was carried; that is, the evidence showed that a particular group of black employees, or some of them, had been injured by an unlawful employment practice and, at least with supplementation of the original evidence, it would be

---

[36] On the surface *Bing II,* by using qualification dates rather than application dates, may appear inconsistent with this decision. Insofar as seniority is concerned, footnote 12 of the *Bing II* opinion notes that "qualification date" is essentially only a variation on the theme of company seniority, which, under the particular circumstances of the case *sub judice,* is the equivalent of the plant seniority mandated by the court. This court's consideration of the significance of the bidding system upon the back pay claims is, however, somewhat at variance with the reasoning of the Fifth Circuit regarding Bing's back pay claim. The variance is thought to be justified by factual differences in the two cases. Here, the bidding system was recognized by the parties prior to July 1965 as giving, in the context of *Bing II,* transfer rights; in *Bing II* the "application" process was in July 1965 not a recognized right, but indeed contrary to the established no-transfer policy. Here, some three years of experience with the open bidding system had elapsed so that by July 1965 blacks knew—or should have known—that they could enter the formerly all-white LOPs; in *Bing II* the court recognized that in July 1965 blacks, with the exception of a few who had the courage to "fight the system", did not bother to apply because they knew full well that blacks were not going to be hired as road drivers. Here, there are scores of possible jobs of varying attractiveness to a given employee; in *Bing II* the issue related to a single higher-paying, higher-status job, obviating any real question of interest.

possible to fix with a reasonable degree of accuracy, though not with exactitude and certainty, the approximate amount of their respective individual damages. The groups, and the causative employment practice involved, were: employees in the former Pratt City Car Shop LOP, where a needed merger of segregated lines was inexcusably rescinded until December 1971 (the *Ford* class); employees in the Blast Furnace Department of the Ensley Steel plant hampered by discriminatory lines of promotion ("1A-1B" configurations) (the *Hardy* class); and PM Finishing Hookers in Fairfield Steel's Plate Mill Department, whose promotional opportunities were frustrated by placement of the Finishing Craneman jobs up in a separate line of promotion (the *McKinstry* class).

The basic approach to fixing the damage claims in these situations was to assume that the changes made in the affected LOPs by the court decree had been made on July 2, 1965, along with the changes in measurement of "age" (*i. e.*, by using plant age) and in defining when vacancies arose (*i. e.*, on force cut-backs of 15 days or more). The employees in the lines were assumed to possess equal fitness and skill and to be equally interested in accepting vacancies higher in the LOP[37]. Then a history was prepared since July 1965, showing deaths, retirements, transfers, increases and decreases in work forces, etc., and vacancy events thereby determined. Employees were then slotted into the vacancies using plant age and the assumptions indicated, producing in essence a flow chart of hypothetical personnel changes. Earnings in a hypothetical assignment were determined during a particular time segment by looking at the earnings in fact of the employee who actually worked during that same time by the assumed occupant at the job and multiplying those hours worked times the hourly rate of the hypothetical assignment. Then the employee's hypothetical earnings were compared to his actual earnings over the same period. Those shown to have sustained a loss by such study were then

---

[37] A variation was made in the *Ford* case due to the significant number of declinations of promotion by both white and black employees. One study was prepared assuming no declinations had the new system been in effect; a second study was prepared assuming the same declinations under the new system as took place under the old system. The results of the two studies were then averaged.

given an award of back pay equal to 150%[38] of the difference in earnings. Sixty-one employees received back-pay awards, most being several thousand dollars though with a spread from a low of $74.62 to a high of $9,851.90. The employment practices causing these damages were joint products of company and local union action, and, utilizing 42 U.S.C.A. § 2000e-2(c)(3), the court assessed one-half of each award against the responsible local union,[39] and the other half against the company.

Each flow chart involved assumptions as to a single LOP and the employees already in such LOP. Even so, many hours were required to make the necessary calculations. Other approaches suggested by plaintiffs were rejected by the court as inconsistent with the requirement to determine on an individual basis the actual loss caused by the unlawful employment practice.[40]

One might argue that, albeit with the expenditure of thousands of man-hours, comparable studies could be made to estimate damage caused by the hindrance to the bidding system resulting from

---

[38] A 50% increment to the ascertained back-pay loss was added, essentially as a prospective-pay equivalent, because the affected employees, even under the decree, will require some additional time to reach their "rightful place." The best estimate of this was, on the average, some 3-4 years, which represents about one-half of the period involved in the study, hence the 50% increment.

[39] The international union was not really responsible for the practices giving rise to the three back-pay awards. It should, moreover, be noted that the international has taken a strong role of leadership, not always without disagreement from the locals, in pushing non-discriminatory policies.

[40] Plaintiffs' suggestion that damages be ascertained by comparing average white employee earnings in the LOP during the period with the earnings of blacks is fundamentally inconsistent with the "rightful place" approach—the court should determine the loss caused by the unlawful employment practice, as distinguished from that which is the result of pre-Act discrimination independent of perpetuating policies. The suggestions regarding lump-sum payments, whether or not accompanied by distinctions based on age or years of employment, while easier in administration and probably more understandable to the affected employees, would result in some employees being paid more than their loss and others less, thus actually creating inequity among recipients of back pay.

use of occupational or LOP age. The court could, for example, be asked to hypothesize that entry into LOPs had been filled since July 1965, purely on the basis of departmental age without regard to the bidding system. But, apart from personal preferences, not all vacancies offer the same actual or apparent opportunities. The most senior employee would be slotted to the first vacancy, perhaps one with lower earnings than his pool job, and, indeed, due to lack of subsequent vacancies in upper jobs in the LOP, it might end up as the final spot for that employee. A younger employee under this hypothesized movement could experience the fortuitous circumstance of getting into a line which subsequently had a number of vacancies or increased work requirements, and move rapidly up to higher paying jobs. Perhaps the court would be asked to assume that the more senior employees, after entering an LOP, would have moved to another LOP having a subsequent vacancy. Or perhaps the court would be asked to reconstruct a progression using complete hindsight, i. e., look back now at all vacancies and operational levels in LOPs over the eight years, determine in retrospect which turned out to be "the best", and hypothetically assign the employees in order of department, plant or company age—such an approach would, of course, produce a fundamentally false methodology for measuring loss caused by any unlawful employment practice.

The ultimate conclusion, simply, is that in the particular context of this case the assessment of back pay for the pre-1963 discrimination systemically perpetuated by the effect of inhibiting seniority standards upon the bidding procedures would be fraught with speculation and guess-work.[41] What were problems in assessing back pay in the three situations in which the same was awarded are unsurmounted obstacles to the across-the-board claims for back

---

[41] While the analysis has dealt with the problems of entering lines of promotion, similar difficulties arise regarding promotions within many LOPs, particularly where there are branches in an LOP or where a job in an LOP actually has higher earnings than some job(s) above it in the line. It should be reiterated that this litigation is concerned with systemic discrimination; it has not determined, or attempted to determine, each claim of individual discrimination, such as the assertion of some black employee who may assert that the rejection of his bid on a job was racially motivated.

pay generally. This conclusion is reached whether under the label of failure of proof,[42] Jinks v. Mays, 464 F.2d 1223, 1226 (CA5 1972), or under the label of equitably determining the true balance of interests, United States v. Georgia Power Co., 474 F.2d 906, 922 (CA5 1973).[43] As stated in *Georgia Power,*

> The trial court's decision must also include a weighing of issues as to limitations and laches . . ., factors of economic reality (*i. e.,* the relative expense of accurate determination of individual rights vis-a-vis the amounts involved) and, most assuredly, the physical and fiscal limitations of the court to properly grant and supervise relief. This listing is intended to be illustrative and not exhaustive. It is our intention to leave the issue altogether open for reconsideration and decision by the court below. 474 F.2d at 922.

If, as indicated, an accurate determination—or even a reasonably accurate estimate—of individual rights is to be a cornerstone for back pay awards, then, with the exception of three specific situations noted, this cannot be done in the present case, and most certainly not within the physical and fiscal limitations of the court.

While it is clear that a claim for back pay cannot be defended on the lack of evil intent or even on a showing of good will, Rowe v. GM Corporation, 457 F.2d 348 (CA5 1972) (remanding for reconsideration of, *inter alia,* back pay notwithstanding strong evidence of good will), this is not to say that such matters are completely unworthy of any consideration, at least in equitably attempting to strike a true balance of interests. *See, e. g.,* LeBlanc v. Southern Bell Telephone & Telegraph Co., 333 F.Supp. 602 (E.D.La.1971), aff'd, 460 F.2d 1228 (CA5 1972); Jinks v. Mays,

---

[42] In this case it is not so much that the evidence is insufficient, as that the evidence adduced demonstrates that assessment of damages cannot be made consistent with applicable principles of law.

[43] It should be noted that the court has considered the question of back pay both from the perspective of class action claims in the private suits and as part of the relief appropriately sought in the Attorney General's suit. In indicating to the parties in January 1973, its conclusion that the Attorney General was not precluded from seeking back pay for the victims of discrimination, the court, as it turned out, correctly predicted the decision of the Fifth Circuit in *Georgia Power.*

464 F.2d 1223 (CA5 1972); Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002 (CA9 1972).

Here, the company—particularly at upper management levels —and the unions—particularly at the international level, and their representatives—have been in the forefront of expanding employment opportunities for blacks. There is no need to recount the evidence which establishes the many initiative steps taken by them to eliminate racial discrimination, albeit still falling short of today's standards. They have modified the employment practices at Fairfield periodically to comply with all legal requirements as from time to time they with reason understand them to be. The Steelworkers union was, in fact, active in obtaining support for passage of Title VII. They had good reason to believe that the seniority system at Fairfield, lauded in Whitfield v. United Steelworkers, 263 F.2d 546 (CA5 1959), also was consistent with Title VII, at least in this circuit.[44] Though not a defense, reasonable good faith efforts at compliance merit some consideration, in equity, particu-

---

[44] In Local 189 v. United States, 416 F.2d 980 (CA5 1969), the first appellate decision requiring a revision of a seniority system such as at Fairfield Works, the court saw no necessary conflict with the decision of the district court in United States v. H. K. Porter, 296 F.Supp. 40 (N.D.Ala.1968), which had upheld such a system in the steel industry. The District Court in United States v. Bethlehem Steel Corp. (Lackawanna plant), 312 F.Supp. 977 (W.D.N.Y.1970), concluded that remedies such as required in *Local 189* were inappropriate in the steel industry. A similar conclusion was reached by a Hearing Panel in the Matter of Bethlehem Steel Corp. (Sparrows Point Plant), OFCC Dkt. 102-68, issued December 18, 1970. Not until June 1971, was the *Bethlehem Steel* (Lackawanna) decision reversed by the Second Circuit, 446 F.2d 652. Even so, the *H. K. Porter* decision was then on appeal to the Fifth Circuit and, particularly in view of its treatment in the *Local 189* opinion, the strong possibility of a conflict in circuit decisions remained. An effort was made on behalf of the parties in the case *sub judice* to obtain information, at least tentatively, as to the Fifth Circuit's decision in *H. K. Porter* for guidance at Fairfield Works, but the decision has not yet been rendered. In forming the decision for Fairfield Works, no effort has been made to analyze factual differences from *H. K. Porter*. Rather, the court has, on the basis of the evidence produced in this case, concluded that violations of Title VII have occurred and formed remedial measures considered appropriate thereto.

larly where a purpose of back pay awards is to encourage non-judicial solutions.

It should perhaps be noted, though obvious, that in this case the parties being asked to provide damages have not received any monetary benefit from the conduct being proscribed. The recipients of the compensation which should have been paid to the victims of discrimination here are not the company and the unions, but rather fellow employees. As immediate displacement of incumbent fellow-workers through "bumping" is considered inappropriate, so also is any consideration of assessing damages directly against those who have benefited from the wrongful practice. The point is—though this, of course, is true in virtually all employment discrimination cases—that there is no factor of unjust enrichment for consideration by the court in weighing the equities.[45]

Another factor for consideration in weighing the equities on an award of back pay is the extent of other relief being granted. In this case, concluding for the reasons already mentioned that back-pay should not be awarded to the rank-and-file black employee, though also recognizing that, while not susceptible of sufficient proof, black employees generally have suffered over a number of years from prior discrimination, the court, quite frankly, has made its injunctive relief somewhat broader than what might strictly be required to correct the statutory violations.[46] The award which

---

[45] Of course, some of the beneficiaries of the unlawful practices were black employees, just as some of those hindered by such practices were white employees. One may well question the equity of an award which required payment of back wages to those blacks underpaid (assuming the evidence were sufficient for such purpose) without giving any credit for over-payments to other blacks which were necessary results of the same act or procedure. Likewise, where a system is being reformed because of its effect on blacks generally, rather than from any actual desire to discriminate against blacks, one may question the equity of an award which failed to compensate those white employees who might be shown to have suffered loss from the very same system.

[46] This is not to suggest that the remedial provisions establish any Utopia for black employees, any more than the prior rules were so viewed by whites. Experience indicates that as new rights are obtained, other less annoying problems invariably are perceived as increasingly troublesome.

cannot be made for pre-Act discrimination and which under the evidence should not be made for post-Act perpetuating policies is in part taking the form of broader injunctive relief for the whole class of black employees, including those who have not suffered the prior discrimination. In this sense the victims of past discrimination are responsible for a better legacy to the younger members of their race.

One further item bears mention; namely, the provision for a form of prospective pay. As part of the injunctive relief those pre-1963[47] employees who elect to take advantage of their new rights by entering new lines of promotion are provided earnings-protection, or "red-circling", in their new line. This is intended to make more meaningful those rights and applies, subject to appropriate limitations, during that first year after entering a new line in which they cannot use their plant age for promotional purposes. As distinguished from the formula used in the Bethlehem Steel Lackawanna settlement, the red-circle rate includes not only protection of the job class rate, but also the incentive earnings.

ATTORNEYS FEES

The same policy that commends the award of back-pay is reflected in the statutory authorization to award attorney's fees to the prevailing parties. The special circumstances which prevented the court from awarding back-pay except in three situations are not, however, problems in the award of attorney's fees. Each of the cases brought by black employees, except for one relating to allegedly segregated facilities—which had been corrected prior to suit—, can properly be viewed as ones in which the plaintiffs prevailed. After consideration of the evidence presented in connection with application for fees, the court awarded fees in each of such cases (except the facility case, which had been abandoned) based

---

[47] Only those employees who had service prior to the open bidding system should have been deterred from bidding by virtue of the inequitable seniority standards to be used in the line of promotion. As the conversion to the bidding procedure actually took place over a period of time, no one point clearly stands as "the" cut-off point. The court chose January 1, 1963, as, on balance, a fair place for demarcation.

on the traditional factors and on the policy of fairly supporting these "private Attorneys General" suits. The total awarded was $205,000.00, and was divided between the company and the particular local union involved in the case. It should be noted that but for the major role carried by the United States in its pattern and practice suit, the time and, in turn, the award of attorney's fees would no doubt have been even more substantial.

DECISION

The findings of fact and conclusions of law contained in this memorandum were the basis for the court's decree of May 2, 1973, and its judgment of August 10, 1973.

United States Court of Appeals,
Fifth Circuit.

Oct. 8, 1975.

UNITED STATES of America, *Plaintiff-Appellant,*

v.

UNITED STATES STEEL CORPORATION et al.,
Defendants-Appellees.

JOHN S. FORD, et al., *Plaintiffs-Appellants,*
CLIFFORD CRAIG AND L. G. PHILLIPS, *Movants-Appellants,*

v.

UNITED STATES STEEL CORPORATION et al.,
Defendants-Appellees.

No. 73-3907.

Appeals from the United States District Court for the Northern District of Alabama.

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

THORNBERRY, Circuit Judge:

These appeals arise from a sharply-contested employment discrimination case which involves over 3,000 black steelworkers. The proceedings below culminated in a decree, entered May 2, 1973, in which District Judge Pointer ordered major changes in the seniority structures at the nine plants of defendant United States Steel Corporation's Fairfield Works, Birmingham, Alabama. Of main interest for present purposes, Judge Pointer found that the Fairfield seniority systems (occupational, line of progression, and departmental)—products of collective bargaining between the company, the United Steelworkers of America, AFL-CIO, and various locals—operated to lock blacks into lower-paying and less-desirable jobs, and thus perpetuated the effects of the company's pre-Title VII active racial discrimination in hiring and initial assignments. The district court ordered implementation of a broad scheme of plant service seniority, rate retention ("red circling"), racial quotas for hiring and promotion, and other remedies designed to eradi-

cate continuing impediments to blacks' reaching their "rightful places." Those measures are not before us for review, as the defendants did not appeal from the court's findings or the decree.

A number of complaints were consolidated below for trial. Out of six certified private class actions brought pursuant to 42 U.S.C. § 2000e-5 and 42 U.S.C. § 1981, involving 464 black employees, the district court awarded back pay to sixty-one members of three classes (the *Hardy, McKinstry,* and "original" *Ford* classes). No appeals were taken with respect to those three classes. The government also litigated a "pattern or practice" suit, 42 U.S.C. § 2000e-6, and sought back pay for the approximately 2,700 remaining blacks in the Fairfield production and maintenance workforce. This prayer was denied, and is the subject of the present appeal.

The government, however, has withdrawn its appeal in favor of the nationwide steel industry settlement, to which United States Steel and the Union are parties. *See United States* v. *Allegheny-Ludlum Industries, Inc.,* 5 Cir. 1975, 517 F.2d 826. In this court the representative appellant for the rank and file black workers on whose behalf the government unsuccessfully sought back pay below is John S. Ford, who, throughout the trial, represented only thirty-five blacks in the Fairfield Car Shop of the Rail Transportation Division (the "original" *Ford* class), The substitution was accomplished by Judge Pointer in the May 2 decree, wherein he summarily enlarged the "original" *Ford* class so as to include in a F.R. Civ.P. 23(b)(2) class action judgment all blacks employed at Fairfield prior to January 1, 1973 who were not otherwise represented in a private class action. Thus, the district court designated in practical and legal effect a "new" *Ford* class.

The now-unchallenged facts which supplied the bases for findings of liabilitity on the part of the company and the unions, and hence the works-wide injunctive relief, are reported with the opinion of the district court, *United States* v. *United States Steel Corp.,* N.D.Ala.1973, 371 F.Supp. 1045, 1049-57. The "new" *Ford* class appeal involves issues concerning the manageability of the class action and whether back pay is available to putative class members. There is in addition an appeal by a group of former black and white ore miners from the denial of their application for permissive intervention pursuant to F.R. Civ.P. 24(b). That is denominated

the *Craig* appeal. Following careful consideration of the district court's opinion, the briefs and oral arguments of the parties, together with the parties' Joint Appendix, we are of the opinion that the district court must be charged with an abuse of discretion in the denial of back pay to every member of the new *Ford* class. This is largely due to a recent series of binding case law developments in this circuit and in the Supreme Court. These cases were decided subsequent to December 11, 1973, the date of the district court's opinion, and therefore Judge Pointer did not have the benefit of them. Furthermore, subsequent to the May 2, 1973 enlargement of the "original" *Ford* class—or, if one prefers, substitution of the "new" *Ford* class—this court sitting *en banc* issued guidelines addressed to the handling of Rule 23(b)(2) employment discrimination class actions in the trial courts. Whether the substance of these guidelines was observed below is not apparent from the record.

On remand, a variety of additional determinations must be made before this case will be capable of assured resolution. We therefore vacate the denial of back pay to the group on whose behalf the government sought back pay below (the "new" *Ford* class), and remand for further proceedings consistent with this opinion and other controlling authority. On remand the district court should carefully redetermine the propriety of the amorphous "new" *Ford* class in light of the consequences of binding such a group to a final judgment. Also, specific findings should be made with regard to the availability of back pay and certain of the defendants' special defenses. Finally, it is necessary that the district court reexamine its legal approach in the context of the foregoing tasks. The existing analysis is no longer acceptable—if ever it was—to justify a generalized conclusion that back pay should not be awarded to victims of employment discrimination. To the extent that the trial court may conclude that additional back pay is now warranted, it should proceed to Stage II of the bifurcated class action procedure, discussed *infra*. At that point it should invite the parties' proposals for computation and distribution, and select a reasonable method for making the affected class whole, while avoiding—as far as possible—the "quagmire of hypothetical judgments."

We are of the view that the present record in the *Craig* appeal presents essentially a grievance by ore miners generally—the use of

plant age instead of company age for seniority purposes—rather than a complaint by blacks that whites were discriminatorily favored in promotion and regression. The testimony relevant to intervenors' application indicated that the focal feature of the seniority system affected the 593 whites and 331 blacks in the same manner: all lost company (ore mine) seniority when assigned to Fairfield Steel Plant. The district court correctly determined that this does not present a palpable Title VII dispute. "The Act does not require a remedy for those not discriminated against." *Gamble* v. *Birmingham Southern R.R.*, 5 Cir. 1975, 514 F.2d 678, 686. Intervenors now indicate they are prepared to make a specific showing of discrimination directed at *black* ore miners in violation of Title VII. We conclude that this appeal must be dsmissed for want of Title VII jurisdiction, irrespective of other requirements for intervention. Whether the proffered showing should be allowed by way of a repleaded application and new evidence in support of intervention will be a question for the district court on remand.

We now proceed to outline the parameters of the district court's inquiry on remand.

I. THE "NEW" *FORD* CLASS ACTION

Judge Pointer's designation of the "new" *Ford* class dovetails with his most complicated set of findings and reasons for denying back pay to the class's members: "failure of proof" or "equitably determining the true balance of interests." 371 F.Supp. at 1061. In three private class actions, involving around 360 black steelworkers, the court found from the evidence specific aspects of the pertinent seniority structures which it was able to identify as having caused economic injury to certain class members. *Id.* at 1059-60. Sixty-one individuals received awards of back pay which were measured with a substantial degree of certitude. In the broader government ("new" *Ford*) action, Judge Pointer denied back pay, not for want of evidence of racial discrimination—such evidence was abundant in statistical form—but because he was unable to isolate specific causal factors to explain earnings disparities between an average black and average white worker in a given production and maintenance line, ability and plant seniority being relatively equal. Noting that under the Fairfield open bidding and job classification scheme *"choice* and *chance," id* at 1053 (emphasis in origi-

nal), played major roles in predicting every line or pool employee's success—irrespective of race or seniority lock-in, *see id.* at 1059 n.36—Judge Pointer "presumed" damages for purposes of injunctive relief, *id.* at 1058, but concluded that individualized back pay could not reasonably be afforded "within the physical and fiscal limitations of the court." *Id.* at 1061-62.

It is simply unclear whether the district court believed that individual awards of back pay to class members must be predicated on proof of each discriminatee's personal economic loss and racially-discriminatory causation at the liability stage (Stage I) of the trial. Appellant Ford argues that Judge Pointer did so believe, and certain portions of the opinion support the argument. *E. g., id.* at 1058 & n.35. On the other hand, the court in fact proceeded to a second, individualized stage, *see Baxter* v. *Savannah Suger Refining Corp.,* 5 Cir. 1974, 495 F.2d 437, 443-45, *cert. denied,* 419 U.S. 1033, 95 S.Ct. 515, 42 L.Ed.2d 308 (1974), with respect to the three private classes in which back pay was awarded. 371 F.Supp. at 1059. Moreover, it appears that the court clearly recognized the liability phase's emphasis on proof of broad patterns and practices, as opposed to individual damages. *Id.* at 1053 & n.18, 1061 & n.41. Also, Judge Pointer correctly anticipated our decision in *United States* v. *Georgia Power Co.,* 5 Cir. 1973, 474 F.2d 906, where we held that the government may seek and recover back pay for discriminatees in a "pattern or practice" action. 371 F.Supp. at 1061 n.43. In summary, the critical factor by which Judge Pointer distinguished the large government suit from the smaller private classes was his ability in the latter instances to identify the causal discriminatory features of the seniority systems and the manner in which they affected those classes, in contrast with his inability to make such determinations in the former case. *See id.* at 1059.

As if to illustrate this justification for denying back pay, Judge Pointer considered several possible methods by which back pay arguably might have been awarded to the members of the "new" *Ford* class. He rejected these approaches as either inequitable and lacking in probative value (gross comparison of average black and average white earnings in the line of progression); inequitable and overly speculative (factor out the chance of bidding into jobs that

turned out less advantageous in the long run); or inequitable and unduly complex in terms of time and expense (use complete hindsight to flow chart all historical vacancies and operation levels; hypothetically assign the most senior blacks to the openings that turned out to be most advantageous). *Id.* at 1060-61. The latter two methods would yield similar, if not identical results, and probably either would have led in some instances to the quagmire, *see Pettway* v. *American Cast Iron Pipe Co.*, 5 Cir. 1974, 494 F.2d 211, 260-61. Yet in the cases of the sixty-one blacks to whom he awarded back pay from among some 360 potential recoverees in three private classes, it appears that Judge Pointer did utilize a method which resembled the approaches he rejected for the larger group. It is clear that the court reconstructed eight years of workforce changes in the three departments and hypothetically assigned plant-senior blacks, in order of plant seniority, to the vacancies (redefined in light of the decree) which the court determined those blacks would have occupied but for discrimination. The effect of the bidding system, moreover, is reflected only in the awards within the "original" *Ford* class, where the court found a "significant number of declinations of promotion by both white and black employees." 371 F.Supp. at 1060 n.37. The court elected to disregard the bidding system in the *Hardy* (Ensley Steel Plant blast furnace department) and *McKinstry* (finishing hookers in the Fairfield Plate Mill) classes. The defendants have not complained of the court's approach as to those two classes.

Appellant Ford strongly contends that the district court's denial of back pay to the larger class of nonrecoverees reflects a manifestly erroneous reliance on "difficulty of ascertainment," a theory which this court has discredited as a general defense to back pay liability. *E. g., Johnson* v. *Goodyear Tire & Rubber Co.*, 5 Cir. 1974, 491 F.2d 1364, 1380; *Pettway, supra.* There are, however, two distinct aspects of both the back pay problem and Judge Pointer's reasoning. First, there is the requirement that the economic disparity—the damages—be the reasonably certain result of unlawful conduct perpetrated against the aggrieved individual or the class to which he belongs. *See* 42 U.S.C. § 2000e-5(g). But second, once a court has determined that a defendant's inequitable conduct caused *some* damages to the class, or to a representative sample of its members, then the burden falls upon the wrongdoer

to explain away or disprove the damages which each claimant's evidence arguably supports. In other words, our decisions established that, with respect to computing those damages which are the reasonably certain result of the wrong,

> (1) unrealistic exactitude is not required, [and] (2) uncertainties in determining what an employee would have earned but for the discrimination, should be resolved against the discriminating employer.

Pettway, supra, 494 F.2d at 260-61 (footnotes omitted); *see also Johnson* v. *Goodyear, supra.* Although it appears that Judge Pointer recognized these distinct problems, his opinion confuses them. Statements which may fairly be read to rely on the absence of proof of each discriminatee's individual loss at the liability stage add to the confusion. 371 F.Supp. at 1058.

Hence, the decision below yields an anomalous contrast. The evidence demonstrated that, since 1965, certain features of the seniority systems had operated widely to reduce blacks' mobility to better jobs in production and maintenance units, including supervisory positions and trades and crafts, and furthermore to deny blacks the training and preparation necessary for advancement to the better jobs. The district court found that those features perpetuated the effects of past discrimination in violation of Title VII and ordered injunctive reforms. In three relatively small departmental classes, moreover, the court could identify specific features which had caused economic losses to the classes, and awarded back pay to certain class members after taking additional evidence. Nowhere did the court draw a qualitative distinction between the discrimination practiced against the small classes and that practiced against the "new" *Ford* class, yet it denied back pay throughout the latter group. Thus, the only distinction of substance followed from the district court's inability to discern causal factors as to the larger group's losses in the sense that damages, to be compensable, must be the result of a legal wrong and not some other cause. This inability may have been compounded by a misunderstanding of the role of individual proof at the liability stage (Stage I).

We believe that both of these difficulties can be largely obviated

on remand by the fundamental expedient of reexamining the scope of the "new" *Ford* class. In a conscientious effort to eliminate multiplicitous litigation by binding the otherwise unrepresented employees to a Rule 23(b)(2) class judgment in which able counsel on both sides has vigorously and thoroughly litigated the issues, the district court created a class which it found in essence to be so diverse and unmanageable that the effects of unlawful discrimination could not be separated from other plausible, but not demonstrably unlawful, causes of members' reduced earnings. On remand the district court should conduct a hearing and take evidence as to the propriety of the "new" *Ford* class, its scope in terms of the ingredients of the judgment, if any, by which it ought to be bound, and its size and membership. General guidance is contained in our *en banc* opinion, *Huff* v. *N. D. Cass Co.*, 5 Cir. 1973, 485 F.2d 710, although the court should tailor its inquiry on remand to the particular circumstances of this case. We do not intend to restrict the focus of a highly serious determination which must involve great flexibility, and concerning which the district court bears special responsibility. *See Hutchings* v. *United States Industries, Inc.*, 5 Cir. 1970, 428 F.2d 303, 310-11.

Inasmuch as the issues already have been thoroughly litigated, at least from the standpoint of basic liability and systemic injunctive relief, the district court need not fear to tread preliminarily on the merits of a classwide request for back pay. The question on remand will be comprehensive and multifacited: the extend to which the "new" *Ford* class is maintainable in a "meaningful and manageable" sense as a class action seeking monetary relief. *Huff, supra.* As a corollary matter, the court should consider the adequacy of the representation, F.R. Civ.P. 23(a)(4), which in this court has been impressive. In this respect the court should consult *Huff, supra, Johnson* v. *Georgia Highway Express, Inc.*, 5 Cir. 1969, 417 F.2d 1122, 1125, and Judge Godbold's specially concurring opinion in that case. We also suggest that the court enter findings in support of its determination.

If the district court again concludes that the "new" *Ford* class action should go forward, the matter will not then be ended, nor will it automatically be appropriate to proceed to Stage II, as described in *Baxter, supra.* It seems to us that much trouble might be eliminated—though we encourage the district court's inde-

pendent judgment on the point—by the use of subclasses under Rule 23(c)(4). *See* the discussion in *Nix* v. *Grand Lodge of Int'l Assn. of Machinists,* 5 Cir. 1973, 479 F.2d 382, 385-86, *cert. denied,* 414 U.S. 1024, 94 S.Ct. 449, 38 L.Ed.2d 316 (1973). *See also Weathers* v. *Peters Realty Corp.,* 6 Cir. 1974, 499 F.2d 1197, 1200; *Jenkins* v. *United Gas Corp.,* 5 Cir. 1968, 400 F.2d 28, 35; *Oatis* v. *Crown Zellerbach Corp.,* 5 Cir. 1968, 398 F.2d 496, 499; 7A C. Wright & A. Miller, Federal Practice and Procedure § 1790 (1972).

It appears that the district court's principal difficulty with the "new" *Ford* class was its size and diverse composition. Those aspects have made meaningful review equally problematic for this court. A large variety of employment practices coalesced to greater and lesser degrees to affect groups of black employees across different plants, departments, job classifications, and earned seniority levels throughout Fairfield Works. In considering whether to designate subclasses for the purposes of back pay, the district court has at its disposal the injunctive decree of May 2, 1973, the decree's Appendices, and the parties' lengthy stipulation which describes the seniority and job classification systems during Fairfield's history up to the trial. These items provide substantial assistance in identifying those departments and lines which were affected by specific practices ordered enjoined, and the contexts and effects of the unlawful practices. The district court by now is intimately familiar with the cause and should encounter no impassable obstacles in drawing subclass lines on the basis of the objective commonality of particular seniority effects as to given groups of employees. We believe that this approach may greatly facilitate the court's determination of the groups of employees within the larger class who are entitled to proceed to Stage II and the presentation of individual back pay claims. Likewise, it should provide this court with a complete picture of the district court's mental processes in the event this lawsuit again comes before us.

In conclusion to this part we dispose of several arguments which are ancillary to the basic class action problems. Initially, we reject appellee United States Steel's argument that appellant Ford lacks standing as a matter of law to respresent any class of black employees broader than the "original" *Ford* class, in which his per-

sonal back pay claim has been satisfied. The scope of Mr. Ford's standing is a matter which the district court should address in the first instance as an element of the inquiry on remand. The court should consider the question in light of *Jenkins, supra,* and *Long* v. *Sapp,* 5 Cir. 1974, 502 F.2d 34, 42, together with any other relevant cases. Nor do we accept the argument that the designation of a "new" *Ford* class constituted inherent error or an unauthorized substitution of parties. Rule 23(c)(1) does require the court to determine the propriety of a class action "[a]s soon as practicable" after its commencement, but the rule adds that the order "may be conditional, and may be altered or amended before the decision on the merits." What is of immediate concern to us is not the class modification standing alone, but the analysis upon which it was entered and the mischief which it inadvertently produced with regard to back pay. The modification itself is not unique in either its purpose or its timing. *See, e. g., Hairston* v. *McLean Trucking Co.,* M.D.N.C.1974, 62 F.R.D. 642, 663-64. It is literally authorized by Rule 23, provided other constitutional and procedural safeguards are satisfied. Finally, we disagree with appellant Ford's argument that we may venture no review whatever of the class enlargement, for want of a notice of cross-appeal by the appellees. F.R.App.P. 4(a). By contrast with a trial ruling which results in the sustaining or denial of a claim or defense, the certification of a class action involves important consideratons of judcial housekeeping. If we assume, somewhat skeptically, that formal notice of cross-appeal is necessary to bring this class action order forward, we would hold nonetheless that the circumstances of this case are sufficient to bring the order within the principle that "the rules themselves ought not be allowed to subvert the 'just' result which 28 U.S.C. § 2106 obliges every appellate court to reach in cases lawfully brought before it for review." 9 J. Moore's Federal Practice ¶ 204.11[5], at 948 (1973) (footnote omitted). In any event, this circuit is committed to the proposition that "[a]ction by the court on maintainability may be triggered by motion of the parties *or on the court's own initiative.*" *Huff,* supra, 485 F.2d at 712 (emphasis added). Just as the district court took up the matter without formal request by any party below, this court may properly do likewise in the interest of justice.

II. BACK PAY

In Part I we summarized the chief reasons upon which the district court denied back pay to the "new" *Ford* class: the inability to identify and distinguish the various causes of class members' economic losses, perhaps with some emphasis on the difficulty of ascertaining the *amount* of compensable damages. Just as the court's discussion of these problems is unclear it is also unclear whether Judge Pointer's concern lay with the proof of economic injury to the class, or with the absence of each member's individual proof at the liability-injunction stage (Stage I). The court also gave other, less prominent reasons for denying back pay: lack of bad faith on the part of the defendants; good faith efforts to comply with the law together with reliance on judicial and administrative decisions which had given positive treatment to steel industry seniority systems; the absence of unjust enrichment to the defendants; and the breadth of other affirmative relief. 371 F.Supp. at 1062-63.

As general or complete defenses to recovery of back pay by *any* employee, the district court's reasons must fail. Controlling precedent disposes of absence of bad faith, no unjust enrichment, and broad injunctive relief as a counterweight for denial of back pay. *See Albemarle Paper Co.* v. *Moody,* —— U.S., ——, ——, 95 S.Ct. 2362, 2374, 45 L.Ed.2d 280, 299 (1975); *Baxter, supra,* 495 F.2d at 442-43; *Pettway, supra,* 494 F.2d at 252-53; *Johnson* v. *Goodyear, supra,* 491 F.2d at 1376-77; *United States* v. *Georgia Power Co.,* 5 Cir. 1973, 474 F.2d 906, 921. With deference to Judge Pointer, we recognize his precognition that the absence of bad faith—or even the presence of good faith—will not by itself defeat a claim for back pay, but is at best a factor to be considered in the larger balance. 371 F.Supp. at 1062. *Accord, Moody, supra,* —— U.S. at ——, 95 S.Ct. at 2374, 45 L.Ed.2d at 299 (majority opinion); —— U.S. at ——, 95 S.Ct. at 2389, 45 L.Ed.2d at 315 (Blackmun, J., concurring in the judgment).

Also to be rejected are the burden of proof-equitable balance justications mentioned earlier, along with the reliance theory, which we treat *infra* as a special defense. With regard to the proof problems, the inquiry and procedure we suggested in Part I should assist the court on remand in identifying particular groups of employees who are entitled, one-by-one, to present personal claims for

back pay. Not unreasonably at the time of his decision, Judge Pointer read certain language in our *Georgia Power* opinion, 474 F.2d at 922, as authorizing a blanket denial of back pay as a matter of discretion in view of the proof, causation, and computation problems posed by the "new" *Ford* class's claim. 371 F.Supp. at 1059, 1061. Indeed, after our subsequent opinion in *Johnson* v. *Goodyear, supra,* one might have thought that a conflict existed within this circuit as to the circumstances under which a district judge could decline to award back pay to an aggrieved class, despite findings of employment discrimination practiced against the class. Later in *Pettway,* however, all doubt was resolved in favor of the *Johnson* v. *Goodyear* presumption, which entitles the class to proceed with individual claims for back pay once the class representative has made out a prima facie case of systemic discrimination. There Judge Tuttle (who also authored *Georgia Power*) explained the *Georgia Power* language as an expression of factors to be considered in connection with the *individual claimant's* burden, rather than the class's:

> This holding [in *Johnson* v. *Goodyear*] is entirely consistent with, and flows from our decision in *Georgia Power* that the presumption in favor of a member of a class discriminated against does not *per se* entitle an employee to back pay without some individual clarification. (citing *Georgia Power,* 474 F.2d at 921-22).

494 F.2d at 259 (emphasis added). Thus, regardless of what might have been a reasonable reading of *Georgia Power* at one time, that case can no longer be taken for the sweeping proposition that "factors of economic reality . . . and . . . the physical and fiscal limitations of the court to properly grant and supervise relief" may operate to preclude an award of back pay to *every* aggrieved employee in a large class action.

Instead, in an effort to relieve tension between management difficulties with numerous, sometimes diverse claimants and Title VII's policy of compensation for discrimination-caused economic injuries, this court has established a bifurcated approach in class actions seeking back pay. At Stage I the *class* must demonstrate a prima facie case of employment discrimination. Sometimes statistical evidence alone will suffice; on other occasions live testimony

or additional exhibits may be necessary. At all events, however, the stress at Stage I is upon demonstration of the defendant's broad employment policies and practices, the defendant's rebuttal and business necessity defenses, and the inferences which remain at the close of the evidence. *See United States* v. *T. I. M. E.—D. C.*, 5 Cir. 1975, 517 F.2d 299 at 315-16; *Rodriguez* v. *East Texas Motor Freight*, 5 Cir. 1974, 505 F.2d 40, 53-55; *United States* v. *Hayes International Corp.*, 5 Cir. 1972, 456 F.2d 112, 120. Although the district court may then find liability and conclude that injunctive relief is appropriate, as did the court below, it is improper at Stage I to require any particular discriminatee to prove personal monetary loss. *Baxter, supra*, 495 F.2d at 443.

Thus, the focus at the close of Stage I is still upon the class, as opposed to any particular putative member. As we noted earlier, once the *class* has proven a prima facie case of discrimination—as was done below—then it is *presumptively* entitled to move into Stage II with the presentation of individual back pay claims. *Johnson* v. *Goodyear, supra.* This presumptive entitlement serves the important function of filling the logical hiatus between large-scale practices and statistically significant effects, which were shown at Stage I, and individual members' claims for sums of money due, which have not yet been demonstrated. At this point the basic question which seemingly perplexed the district court arises: may the court, consistently with the "make whole" purpose of back pay, require a class or subclass to demonstrate some tangible economic loss *as a class or subclass*, attributable to one or more proven discriminatory practices? In other words, may the court condition the presumption upon some quantifiable showing of causation between inequitable conduct and economic injury-in-fact to an objectively and empirically homogeneous group *qua* group?

We need not further constrict the district court's statutory discretion by saying that it may never do so under any circumstances. Logically, a suit that proceeds as a class action for monetary relief necessarily contemplates some degree of proven economic damage to the class in general, as a result of the defendant's violations. Where, as here, the circumstances of a large class action raise occasional issues of alternative causation—as with the bidding system and the irregular correspondence between hourly wages and job

classification—some minimal burden on a given group may be appropriate. On the other hand, the fact that a defendant has managed to discriminate against many people instead of a few is no ticket to freedom from liability to those who suffered less than the most obvious victims. "Important national goals would be frustrated by a regime of discretion that 'produce[d] diffierent results for breaches of duty in situations that cannot be differentiated in policy.' " *Moody, supra,* —— U.S. at ——, 95 SCt. at 2371, 45 L.Ed.2d at 296, *quoting Moragne* v. *States Marine Lines,* 398 U.S. 375, 405, 90 S.Ct. 1772, 1790, 26 L.Ed.2d 339. Moreover, any causation burden which the court imposes on the group, as such, must be not only minimal in weight, but also very general in scope, so as to avoid converting the procedure into the protracted series of claimant-by-claimant trials which *Baxter* commits to a later stage.

With these considerations in mind, and cognizant of our responsibility to "maintain a consistent and principled application of the backpay provision," *Moody, supra,* —— U.S. at ——, 95 S.Ct. at 2373, 45 L.Ed.2d at 299, we conclude that the district court may require a class or subclass to come forward, as a part of the class or subclass prima facie case, with some threshold showing of economic loss and causation, *if* the defendant's evidence has drawn into substantial question the group's entitlement to move into Stage II claimant-by-claimant. In all likelihood the defendant's ability to raise substantial doubt about the groups's entitlement will occur only rarely. We anticipate that the defendant would have to show convincingly, and with statistically fair exhibits, that a given group of discriminatees outearned, or at least earned as much as, a plant seniority-comparable group of whites during the discriminatory period. Even this kind of showing will not defeat the right of each member of the group to claim back pay at Stage II, if the class representative can make a reasonable argument that the exhibit is distorted, or that a significant number of members might have earned even more than their white contemporaries but for the continued effects of discrimination. Positive proof by each member of the group is not necessary at that point. The representative need only raise on behalf of the class a reasonable inference of "cognizable [economic] deprivations to it as a class," *Baxter, supra,* 495 F.2d at 443, "based on racial discrimination by the employer [or union] in the employment relationship." *Johnson* v. *Goodyear, su-*

pra, 491 F.2d at 1375. This inference justifies the presumption which entitles the group to move into Stage II.

On remand the district court should reconsider its approach to back pay for the "new" *Ford* class in light of the preceding discussion. The procedures suggested in Part I, *supra,* may well facilitate the court's task. Consideration of judicial efficiency are important, but there is no reason why the need for efficiency cannot be reconciled with what is by now a nearly certain, if not "automatic or mandatory," duty to award back pay to discriminatees who can prove their entitlement to monetary rcovery. *Cf. Moody, supra.* In the event the court again decides that any particular group within the affected class should not go forward to Stage II, it must carefully articulate its findings and conclusions. *Id.* —— U.S. at —— n.14, 95 S.Ct. at 2373 n.14, 45 L.Ed.2d at 299 n.14; *Stevenson* v. *International Paper Co.,* 5 Cir. 1975, 516 F.2d 103, at pp. 117-118.

Insofar as the district court may conclude that additional back pay is now in order, the burden-of-proof rules respecting individual claims are set forth in *Baxter,* 495 F.2d at 443-45, and *Johnson* v. *Goodyear,* 491 F.2d at 1379-80. These rules generally contemplate a scheme of proof, computation, and distribution initiated by a series of claimant-by-claimant trials, and we have spoken accordingly heretofore in describing the functions of Stage II.

After consulting *Pettway, supra,* 494 F.2d at 258, with regard to Alabama limitations, the beginning date, and the closing date of the back pay period, the district court, with the assistance of the parties, should strive to the fullest practicable degree to award back pay by reconstructing hypothetically each eligible claimant's work history. This was done in the cases of the sixty-one employees who received back pay following the trial below. 371 F.Supp. at 1060. To the extent that actual, historical vacancies in the employer's workforce can be flow-charted with reasonable accuracy, the court should award the back pay to the minority employees who, in its sound judgment, would have occupied those vacancies but for discrimination, and whose projections show a loss of wages. Part of "[t]he key is to avoid . . . granting a windfall to the class at the employer's expense. . . ." *Pettway, supra,* at 262 n.151. Therefore, if the parties can reasonably reconstruct the history of the changes

in the Fairfield workforce, the court should utilize those data for identifying "vacancies" in light of its decree, and should not presume that additional vacancies occurred. Apart from protecting the defendant, this method has the virtue of distributing the recovery to the victims who, by the greater likelihood, are entitled to it.

On the other hand, the remainder of "the key" is to avoid "the unfair exclusion of claimants by defining the class or the determinants of the amount too narrowly." *Id.* Quite probably there are some aggregations of claimants, similar in plant seniority and ability, each of whom might reasonably be slotted into the same historical vacancy and awarded a "winner-take-all" sum of back pay. Obviously, this cannot be done if the court is to remain faithful to the actual experience of the plant. Such a situation calls forth the "quagmire of hypothetical judgment" for which *Pettway,* 494 F.2d at 262-63, suggests several alternative solutions. The district court is free to consider the classwide approaches suggested in *Pettway,* as well as any other reasonable methods for making the affected class whole. We commend the court particularly to the use of pro rata shares, *id.* at 263 & n.154, in those instances where the quagmire persists even after reasonable efforts geared toward greater individual certainty have been attempted. This method involves a distribution across the affected group of the sum which represents the largest loss suffered by a group member who, as likely as any other, could have occupied the vacancy in question but for discrimination. Individual awards can be computed for each member of the group by the use of a linear progression formula. For example, if during a given period white A, with less plant seniority, occupied a job at which he earned $15,000, but blacks B, C, D, E, and F, with respective earnings in lower jobs of $10,000, $11,000, $12,000, $13,000, and $14,000, each were equally capable and substantially equal in superior plant seniority, than their pro rata recoveries for the period could be computed as follows: $5x + 4x + 3x + 2x + x = \$5,000$. The variable, x, comes to roughly $333. Thus, B, whose hypothetical loss is five times greater than F's, recovers about $1,665; C recovers $1,332; D takes $999; E recovers $666; while F, who suffered the least economic injury, recovers $333. The defendants may wish to argue that under no circumstances would employee F, the one with

the most damages, or for that matter any of the other discriminatees, have succeeded to the job ahead of A, or ahead of another black. The defendants have the burden of persuasion on the point, by a standard of "clear and convincing" evidence. *Johnson* v. *Goodyear, supra,* 491 F.2d at 1380.

Of course, the pro rata method will seldom, if ever, work out as conclusively or as simply as the example. The threshold determination of the eligible group of employees will often present complex factual issues. The court that opts for a pro rata method will have to deal with tediously-computed fractional constants in most cases. By suggesting such a method we do not intend to exclude other reasonable alternatives, for we recognize that "the trial court will often have the keener appreciation of those facts and circumstances peculiar to particular cases." *Moody, supra,* —— U.S. at ——, 95 S.Ct. at 2373, 45 L.Ed.2d at 299. Also, we reemphasize that alternative methods possessed of superior certainty should be exhausted before the court resorts to racially-drawn classwide comparisons or pro rata approaches. *See* Judge Bell's specially concurring opinion in *Pettway, supra,* 494 F.2d at 267. Similarly, the indiscriminate black-white wage averaging approach advanced by the plaintiffs and rejected by the district court, 371 F.Supp. at 1060 n.40, would seem to be foreclosed by our decision in *Georgia Power* as a basis for making individual awards, *see* 474 F.2d at 921-22, absent at least a precise breakdown of subgroups from the standpoint of plant age. *See Pettway, supra,* 494 F.2d at 262, discussing *Stamps* v. *Detroit Edison Co.,* E.D.Mich.1973, 365 F.Supp. 87, 121-22 [rev'd on other grounds, *sub nom., Equal Employment Op. Com'n* v. *Detroit Edison Co.,* 6 Cir. 1975, 515 F.2d 301]. In conclusion, we express full confidence in the ability of the district judge to achieve a result consonant with the important compensatory purpose of back pay. The court is free to appoint a master to assist with Stage II, and, as always, the parties are free to negotiate a settlement.

As a caveat to our discussion of back pay, we add a few remarks which are necessary to place this matter in full perspective. On December 19, 1974, Judge Pointer entered, as between the government and the defendants, an amendment which conformed the May 2, 1973 Fairfield decree to the industry-wide consent decrees which we upheld in *United States* v. *Allegheny-Ludlum Industries,*

Inc., supra. The amendment provides that the back pay under Consent Decree I shall become available to eligible Fairfield employees (1) upon "exhaustion of all appellate proceedings" in *Allegheny-Ludlum,* in which appellant Ford is an intervenor challenging the settlement's legality; and (2) "upon receipt of a remand, if any," from this court in this appeal. Thus, it is clear that the back pay provision of Consent Decree I will not apply to Fairfield Works unless and until both conditions are met. Timewise, there is no way to foretell how quickly the back pay under the settlement will become available at Fairfield, nor could we predict how quickly any class or subclass involved in this appeal might reach the stage of individual back pay relief. Either could involve anywhere from a few weeks to many months. Nevertheless, we point out that the liability stage of the trial in this case was completed almost a year prior to the entry of the consent settlement. Under these circumstances, we conclude that those Fairfield employees who fall within the description of a class or subclass duly certified by the district court on the remand of this case, pursuant to F.R.Civ.P. 23(b)(2), shall look at all times to this case for their back pay. In specific instances this case may yield more money than the consent decree; in others it may yield less. Yet, insofar as this action continues toward final repose as a Rule 23(b)(2) class action, there will be no "opting out" by individual class members at any point. *LaChapelle* v. *Owens-Illinois, Inc.,* 5 Cir. 1975, 513 F.2d 286, 288 n.7. *But cf. Pettway, supra,* 494 F.2d at 263 n.154. To the extent that the class of eligible black employees under the consent decree overlaps with the Fairfield class or classes—and presently there is considerable overlap—the latter employees' identification with this case will serve the interests of both sides. It will ensure contested, adjudicated compensation to Fairfield employees who are so entitled; it will preserve whatever cohesiveness they achieved prior to the entry of the consent decrees; and it will protect the defendants from the risk of employees gambling on greater or double recoveries under the consent decree. Conversely, in the event the consent decree funds earmarked for Fairfield become available while this case is before the district court, the defendants ought to be able to use those moneys—to the extent they are adequate—in satisfaction of back pay judgments which may be rendered on remand. There is nothing in the conforming amendment

or the May 2 decree which suggests that Consent Decree I's allotment for Fairfield should not be distributed in that fashion, provided the defendants observe the consent decree's terms as to eligibility and method of computation.

III. OTHER DEFENSES AND RELATED ISSUES

Both the company and the union seek to escape back pay liability to the members of the "new" *Ford* class by way of certain affirmative defenses. Unlike the generalized pleas to equity which we dismissed earlier, however, these defenses—to the extent they are valid—either do not call for a blanket denial of back pay to all discriminatees, or else they merely entail equitable apportionment of eventual back pay responsibility as between the defendants.

The company relies on a mass of pretrial and post-trial exhibits which purportedly demonstrate significantly higher black, as opposed to white, rates of refusal to bid on entry-level jobs in the line of progression, voluntary freezing in lower jobs following advancement into the line, and waivers of promotional opportunities under the court-reformed seniority system. The company seeks to use this evidence primarily in an effort to block the class, or particular groups within it, from reaching the individualized back pay stage. This, we conclude, the exhibits cannot accomplish. Initially, there is at best only a tenuous logical connection between the failure of isolated blacks to promote and the issue of economic injury to the broader class of blacks on account of unlawful discrimination. Judge Pointer found that Fairfield's numerous forms and subforms of occupational, line, and departmental seniority operated to perpetuate the effects of the company's pre-Title VII active racial discrimination in hiring and initial assignments. The company does not queston those findings on appeal. Additionally, we must recognize that victims of discrimination frequently hesitate to move into new jobs when, as at Fairfield, the price of mobility is loss of seniority earned in a former position. *See United States* v. *Jacksonville Terminal Co.*, 5 Cir. 1971, 451 F.2d 418, 453, *cert. denied*, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815 (1972), where the black employee's dilemma is aptly described. Under a history in which blacks were hired into less-desirable jobs and remained behind their white contemporaries in terms of the kinds of seniority necessary for

advancement to and security in the higher-paying jobs, the experience under a bidding system neutral on its face is not a persuasive indicator of the progress blacks would have made *as a group* but for seniority discrimination.

On the other hand, we do not wish to demean whatever evidentiary value the company might be able to extract from its exhibits in terms of class or subclass mitigation, as in Judge Pointer's method of awarding back pay among the members of the "original" *Ford* class. Nor do we intend to subtract from the probative value of any *particular* employee's declination of a promotional opportunity, either before or after the institution of reformed seniority. In either case it is more likely with the evidence than without it that the employee would have refused the promotion under any circumstances, in which event he should not receive damages for the wages waived. We simply note that these are questions to be considered by the district court on remand. The applicable burden-of-proof rules are those laid down in *Johnson* v. *Goodyear* and *Baxter, supra.*

In contrast to the company, the union does not rely so much upon factual arguments as upon a rather fragile theory of the law. Essentially, the union contends that any discrimination for which it may be responsible was the result of good faith efforts to comply with the law, undertaken in reliance upon earlier lower court and administrative decisions which had given positive treatment to similar seniority systems at other basic steel production facilities. Specifically, the union points to *Whitfield* v. *United Steelworkers,* 5 Cir. 1959, 263 F.2d 546; *United States* v. *H. K. Porter Co.,* N.D. Ala.1968, 296 F.Supp. 40, 66-67, *vacated with instructions,* 5 Cir. 1974, 491 F.2d 1105; *United States* v. *Bethlehem Steel Corp.,* W.D.N.Y.1970, 312 F.Supp. 977, *modified and remanded,* 2 Cir. 1971, 446 F.2d 652; *Matter of Bethlehem Steel Corp. (Sparrows Point Plant),* OFCC Dkt. 102-68, Dec. 18, 1970, *rev'd by Sec'y of Labor,* Jan. 15, 1973, EPD ¶ 5128; and certain language in *Local 189, United Papermakers* v. *United States,* 5 Cir. 1969, 416 F.2d 980, 993, *cert. denied,* 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.-2d 100 (1970). From these cases the union gleans respectable support for its contention that, at least until the Second Circuit's decision of June 21, 1971 in *Bethlehem Steel,* it appeared that the reme-

dies of plant-service seniority and rate retention would not be applied to the steel industry due to the dangers and complexities of the steel manufacturing process. Moreover, when the Second Circuit issued its opinion in *Bethlehem Steel,* the district court decision in *H. K. Porter* was pending on appeal to this court, and remained on this court's docket for almost three more years, despite interim requests by the government and the union for this circuit's response to the issue of "rightful place" relief in the steel industry. Thus, the union insists that the defendants in this case reasonably relied on the prior decisions in maintaining and defending the Fairfield seniority systems, and that the prior decisions gave positive notice of a steel industry business necessity exemption from the remedies which were first ordered in the tobacco and paper industries. *See Quarles* v. *Philip Morris Co.,* E.D.Va.1968, 279 F.Supp. 505; *Local 189, supra.* The union therefore asks us to exonerate it from potential back pay liability on grounds of "exceptional circumstances" or "substantial injustice."

The appellants characterize the union's theory of a "unique" steel industry litigation history as an elaborate appeal to the "unsettled state of the law"—a theory which we have thoroughly rejected as a defense to back pay liability under both Title VII and Section 1981. *See Johnson* v. *Goodyear, supra,* 491 F.2d at 1377; *Pettway, supra,* 494 F.2d at 255 & n.132. *Cf. Moody, supra,* —— U.S. at —— & n.15, 95 S.Ct. at 2374 & n.15, 45 L.Ed.2d at 299 & n.15. Despite the union's lack of bad faith and Judge Pointer's finding that it "had good reason . . . at least in this circuit," 371 F.Supp. at 1062, to believe that the Fairfield seniority systems comported with the law, we believe that the appellants are fundamentally correct. As we stated in *Johnson* v. *Goodyear, supra:*

> At least since July 2, 1965, the effective date of Title VII, the employers of this nation have been on notice that employment discrimination based on race, whether overt, covert, simple or complex, is illegal. In this case, the employer has been violating the Act as to some employees since that date. If we were to accept the employer's position the effective date would be advanced at least to the date of the *Griggs* [*Griggs* v. *Duke Power Co.,* 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158] opinion. This result would be untenable and completely

> at odds with the Congressional purpose evidenced by enacting Title VII. Title VII is strong medicine and we refuse to vitiate its potency by glossing it with judicial limitations unwarranted by the strong remedial spirit of the act. (footnote omitted).

Accord, Pettway, supra, 494 F.2d at 255-56.

Title VII applies, of course, to unions which are parties to the collective bargaining agreement as well as to employers. *See Johnson* v. *Goodyear, supra,* at 1381; *Carey* v. *Greyhound Bus Co.,* 5 Cir. 1974, 500 F.2d 1372, 1379. Both were placed on notice of the law at the same time. The gist of the union's argument, however reasonable it may appear depending on the orientation from which one reads the cases cited in support thereof, reduces to a contention that the defendants should not somehow be penalized for reliance on what turned out to be an erroneous view of the law. We dismissed a similar argument in the context of the public accommodations provisions of Title II of the 1964 Civil Rights Act, *see Miller* v. *Amusement Enterprises, Inc.,* 5 Cir. 1970, 426 F.2d 534, 536: "[t]he actions of Fun Fair Park became subject to the prescribed judicial relief not because the Court said so, but rather because the Court said—even perhaps for the very first time—that the Congress said so." We reach the same conclusion here, without consideration of whether other cognizable "exceptional circumstances" or "substantial injustices" may exist apart from compliance with state protective statutes which have not been ruled inconsistent with Title VII. *Cf. Moody, supra,* —— U.S. at —— nn. 17, 18, 95 S.Ct. at 2374, nn. 17, 18, 45 L.Ed.2d at 299, 300 nn. 17, 18; *Pettway, supra.* 494 F.2d at 254; *Johnson* v. *Goodyear, supra,* 491 F.2d at 1377. *See also Stevenson* v. *International Paper Co., supra,* at 113-114 ("government [OFCC] imposed" discrimination at the plant involved in the lawsuit). The crux of the matter is that the defendants in this case took a particular legal position in litigation over the issue of their seniority system's legality. This was their right, but with it came the usual risks of litigation, including the risk of civil liability. The defendants' position failed them; the statute and the authoritative cases construing it provide for back pay in order to make the victors whole; and we decline to subvert that integral scheme with a crazy-quilt pattern

of different back pay liability dates, industry-by-industry, plant-by-plant, on the basis of a few district court decisions, administrative panel rulings, and nonprecedential appellate language, all involving factual settings at places other than Fairfield Works. To embark upon such a course would entangle the compensatory, nonpenal purpose of back pay in a web of judicial gamesmanship.

Nevertheless, one legitimate defense of sorts remains available to the union with respect to back pay liability. In the three private class actions in which Judge Pointer awarded back pay below, the International was absolved of back pay responsibility because it "was not really responsible for the practices giving rise to the three back-pay awards." 371 F.Supp. at 1060 n.39. Instead, the court assessed the awards one-half against the company and one-half against the offending locals. On remand the parties are free to litigate these same issues in connection with any back pay which may be awarded in favor of the members of the "new" *Ford* class. The apportionment problem is initially one for the district judge, and we intimate no further view except to suggest that the court consider the matter in light of our recent cases. *See Guerra* v. *Manchester Terminal Corp.*, 5 Cir. 1974, 498 F.2d 641, 655-56; *Gamble* v. *Birmingham Southern R.R., supra,* 514 F.2d at 686-87; *Johnson* v. *Goodyear, supra,* 491 F.2d 1381-82, and any other relevant cases which the parties may bring to the district court's attention. The district court also should enter specific findings in support of its determinations of back pay responsibility.

IV. CONCLUSION

We have given careful consideration to all other contentions on appeal and find them to be without merit.[1] For the reasons dis-

---

[1] For example, we note that the company's request for a trial by jury has been foreclosed in this circuit by *Johnson* v. *Georgia Highway Express, supra,* 417 F.2d at 1125. We are also aware that the company's alternative plea for recognition of substantial discretion in the district judge over whether to award back pay is supported by Justice Rehnquist's concurring opinion in *Moody, supra,* —— U.S. at ——, 95 S.Ct. at 2384-87, 45 L.Ed.2d at 312, 313. On the other hand, our cases, *e. g., Pettway, supra,* hold that the district court's discretion to deny back pay is "narrow." 494 F.2d at 252. The only "special cir-

cussed heretofore the *Craig* appeal is dismissed. The decision of the district court denying back pay, which was brought forward by the *Ford* appeal, is vacated and remanded for further proceedings consistent with this opinion.

---

cumstance" we have recognized is that of a conflicting state statute which required the employer to violate Title VII. *See LeBlanc* v. *Southern Bell Tel. & Tel. Co.,* E.D.La.1971, 333 F.Supp. 602, *aff'd per curiam,* 5 Cir., 460 F.2d 1228, *cert. denied,* 409 U.S. 990, 93 S.Ct. 320, 34 L.Ed.2d 257 (1972). Moreover, this circuit has already extended the principle of *Story Parchment Co.* v. *Paterson Parchment Paper Co.,* 282 U.S. 555, 565-66, 51 S.Ct. 248, 251, 75 L.Ed. 544, 550 (1931), to Title VII back pay cases. ("Difficulty of ascertainment is no longer confused with right of recovery."). *Johnson* v. *Goodyear, supra,* 491 F.2d at 1380. As Mr. Justice Rehnquist observed in *Moody,* this principle's classic application has occurred in suits for money damages, in which the parties ordinarily are entitled to a jury trial. Thus, to reconcile this variety of competing tensions in the context of Title VII is no simple task. Yet we have endeavored conscientiously herein to follow the controlling precedents of this court and of the Supreme Court. In the absence of a material conflict between our decisions and the majority opinion in *Moody,* we are bound to do so. Though perhaps, as the union argues, some degree of conflict now exists, *compare Moody, supra,* —— U.S. at ——, 95 S.Ct. at 2371-72, 45 L.Ed.2d at 296-297, *with Pettway, supra,* 494 F.2d at 253, we believe that the inconsistency is superficial to this case. Our lawsuit is now well beyond the point at which the "reasonably certain prospect of a back pay award" operates as an incentive to voluntary compliance. *Cf. Moody, supra,* —— U.S. at ——, 95 S.Ct. at 2371, 45 L.Ed.2d at 296. Instead, we are concerned with back pay as "an equitable award for *past* economic injury." *Pettway, supra* (emphasis in original). From the standpoint of the *compensatory* purpose of back pay, which is at issue here, we perceive no conflict whatever between previous decisions of this court and the majority opinion in *Moody.*

United States Court of Appeals,
Fifth Circuit.

Jan. 14, 1976.

UNITED STATES of America, *Plaintiff-Appellant,*

v.

UNITED STATES STEEL CORPORATION et al.,
Defendants-Appellees.

JOHN S. FORD et al., *Plaintiffs-Appellants,*
CLIFFORD CRAIG AND L. G. PHILLIPS, *Movants-Appellants,*

v.

UNITED STATES STEEL CORPORATION et al.,
Defendants-Appellees.

No. 73-3907.

ON PETITIONS FOR REHEARING
AND PETITION FOR REHEARING
EN BANC

(Opinion Oct. 8, 1975, 5 Cir., 520 F.2d 1043).

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

PER CURIAM:

The petitions for Rehearing are denied and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12), the Petition of United States Steel Corporation for Rehearing En Banc is denied.

By way of clarification, all parties should recognize that the district court's final certification of the "new" Ford class is the door

that bars opting out of class members. The panel's original opinion in this cause was not intended to rule out the tender of back pay under the Consent Decree approved by this Court in *United States* v. *Allegheny-Ludlum Industries, Inc.*, 5th Cir. 1975, 517 F.2d 826. The district court will, on remand, define the "new" *Ford* class in such a way as to exclude those persons who elect to accept such back pay tenders. *Cf. LaChapelle* v. *Owens-Illinois, Inc.*, 5th Cir. 1975, 513 F.2d 286, 288 n. 7.